IN THE

Supreme Court of the United States

October Term, 1955.

No. 323.

UNITED STATES OF AMERICA, ex rel., DAVID DARCY,
Petitioner,

vs.

EARL D. HANDY, Warden of Bucks County Prison, DR. FRED S. BALDI, Warden of the Western State Penitentiary, and CARL H. FLECKENSTINE, United States Marshal for the Middle District of Pennsylvania,
Respondents.

Brief for Petitioner

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

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The opinion of the United States Court of Appeals for the Third Circuit, remanding the case to the district court for a full hearing on the issues of the alleged atmosphere of hysteria and prejudice prevailing at the petitioner's trial, including any issues raised by Judge Boyer's asserted visits to the courtroom during Darcy's trial, is reported in 203 F. 2d 407.

The opinion of the district court denying the petition for writ of habeas corpus, (R. 1191a-1244a), after a hearing relating to the circumstances under which the petitioner was tried in Bucks County, Pennsylvania, for felonious homicide in the commission of an armed robbery, is reported in 130 F. Supp. 270.

The opinion of the United States Court of Appeals for the Third Circuit, affirming in a divided (4-3) decision, the decision of the district court is reported in 224 F. 2d 504.

The majority opinion rendered by Hastie, J., is reported in 224 F. 2d 504, 505-509, (R. 1245-1250). The dissenting opinion by Kalodner, J., concurred in by McLaughlin, J., is reported at 224 F. 2d 504, 509-516, (R. 1251-1265), and the dissenting opinion by Biggs, C. J., is reported at 224 F. 2d 504, 516-517, (R. 1265-1266).

The divided (4-3) order of the Court of Appeals (R. 1268) denying petition for rehearing is not reported.

JURISDICTION.

The petitioner was convicted of murder in the first degree, with penalty fixed at death; in the Court of Oyer and Terminer of Bucks County, Pennsylvania, after a jury trial, on June 14, 1948.

The judgment of the Court of Appeals was entered on June 9, 1955, (R. 1267). A petition for rehearing was denied by the Court of Appeals on July 11, 1955, (R. 1268). The Court of Appeals on July 11, 1955, entered an order staying the mandate in this case until August 15, 1955, to permit petitioner to make application to this Court for Writ of Certiorari, (R. 1268).

The petition for a writ of certiorari was filed on August 15, 1955. The petition was granted on October 24, 1955, (R. 1269). This Court extended until February 17, 1956, the time for filing petitioner's brief on the merits upon application made pursuant to Rule 34(2).

The jurisdiction of this Court is invoked upon 28 U. S. C. A. Section 1254(1).

3.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

Constitution of the United States.

Amendment XIV.

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Federal Statutes.

The revised Judicial Code, 28 U. S. C. A. Section 2241.

"(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

* * *

"(c) The writ of habeas corpus shall not extend to a prisoner unless —

* * *

"(3) He is in custody in violation of the Constitution or laws or treaties of the United States; * * *."

The revised Judicial Code, 28 U. S. C. A. Section 1254(1).

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; * * *."

Pennsylvania Statutes.

The Act of June 24, 1939, P. L. 872, Section 701, 18 Purdon's Penna. Statutes Annotated, Section 4701:

"* * * Whoever is convicted of the crime of murder of the first degree is guilty of a felony and shall be sentenced to suffer death in the manner provided by law, or to undergo imprisonment for life, at the discretion of the jury trying the case, which shall fix the penalty by its verdict * * *."

The Act of March 31, 1860, P. L. 427, Section 40, 19 Purdon's Penna. Statutes Annotated, Section 785:

"* * * In all cases in which two or more persons are jointly indicted for any offense, it shall be in the discretion of the court to try them jointly or severally, except that in cases of felonious homicide, the parties charged shall have the right to demand separate trials. * * *."

4.

QUESTIONS PRESENTED FOR REVIEW.

1. Did the Court of Appeals err in holding that petitioner in a habeas corpus proceeding, under sentence of death for murder, who claimed that he had been denied a fair trial in a state capital case because of the atmosphere of hysteria and prejudice prevailing at his trial and because of the interest, attendance and participation of an "overseer judge" in his case, had not been denied due process of law under the Fourteenth Amendment merely because there was no proof that the physical presence of a mob or a threat of mob violence dominated his trial, but where, however, there was the following proof of a more subtle, yet even more effective, type of domination of his trial by prejudice and hysteria; that, immediately following a hold-up murder in a small rural county, there was expressed public sentiment and prejudice against the four youths involved; that local newspapers carried inflammatory and prejudicial front-page reports of the crime of the "trigger-happy bandits" from Philadelphia and of their confession of this and other holdups, in four of which the petitioner was erroneously included as having been a participant; that newspaper editorials criticized leniency of juries in not imposing death penalties and condoned "mob law"; that, prior to the trial of his companions, public sentiment throughout the county was vociferous in condemning the bandits and in demanding the death penalties; that, daily during the two weeks of his companions' trial, the newspapers carried inflammatory front-page reports of the trial and of petitioner's role in this and other hold-ups, although in four of said hold-ups he was not involved; that local radio stations broadcasted

daily news of his companions' trial; that petitioner had originally been granted a separate trial, scheduled for the term of court following the trial of his companions; that, suddenly, at the end of his companions' trial, petitioner's trial was scheduled to start immediately after his companions' trial; that the jury panel, from which his jury was selected, appeared in court during his companions' trial and had the opportunity to listen thereto; that petitioner's trial started three days after his companions' trial ended, on the very first day of the first session of the Court immediately thereafter, while the newspaper and radio publicity were still fresh; that the voir dire examination of the petitioner's jury showed a marked increased fixity of opinion of prejudging of and prejudice against him; and that, during his trial, the trial judge in his companions' case, whom the jury "knew" as being hostile to petitioner and who had publicly voiced his indignation against these "outlanders", showed such an extraordinary interest in the proceedings by his excessive attendance and active participation thereat as to guide and influence the jury's verdict and imposition of the death sentence?

2. Did the Court of Appeals err in holding that the "extraordinary and unprecedented conduct" of a judge, other than the trial judge in the petitioner's case, was not so unfair and prejudicial as to amount to a denial of due process of law, where there was proof that said "overseer judge" had presided at the trial of petitioner's companions; that he had publicly praised that jury for having imposed the death penalties; that he was present every day, beginning with the very first session on the first day, and even attended an evening session, during the petitioner's trial and sat either on the bench with the trial judge or in a "special chair" at a prominent position facing the jury as a spectator in the court room; that at times he joined the trial judge

on the bench "for whispered consultations" within view of the jury; that during one such consultation he, rather than the trial judge, actually made a ruling on a vital evidentiary issue; that during the charge to the jury, he actively helped the prosecutor; that he was identified by the jurors as "an official who was hostile" to petitioner; and that such "rather striking manifestation of extraordinary interest" and participation effectively guided and influenced the jury's verdict, fixing the penalty at death rather than at life imprisonment?

5.

STATEMENT OF THE CASE.

I.

History.

Darcy, the petitioner, then 22 years old, and three companions, Foster, 23, Zeitz, 18, and Capone, 16, engaged on December 22, 1947, in the armed robbery of the Feasterville Tavern near Doylestown, Bucks County, Pennsylvania. While the four youths were fleeing in an automobile from the scene of the robbery, a bystander, Kelly, was shot and killed by Zeitz.

As a result of this homicide, the petitioner and his three companions were jointly indicted in the Court of Oyer and Terminer of Bucks County, Pennsylvania, at No. 37, February Sessions, 1948 for the murder of Kelly, growing out of armed robbery.

Petitioner requested and was granted severance. Capone pleaded guilty.

Foster and Zeitz, two of petitioner's companions in the robbery, were tried first on this charge, before a jury pre-

sided over by Judge Calvin S. Boyer. The trial started on Monday, May 24, 1948, and *ended on Friday, June* 4, 1948. The jury returned a verdict of first degree murder and, in the exercise of their discretion as authorized by Section 701, of the Penal Code of 1939, (18 Purdon's Penna. Statutes Annotated, Section 4701), fixed the penalty at death. The judgments and sentences were affirmed by the Supreme Court of Pennsylvania, and opinions are reported at 364 Pa. 288, 72 A. 2d 279 and 364 Pa. 294, 72 A. 2d 282.

The petitioner was placed on trial in the same court, before President Judge Hiram H. Keller and a jury on *Monday, June* 7, 1948, just three days after the convictions and sentences of Foster and Zeitz.

Petitioner's trial took place in a hostile and prejudicial atmosphere just 3 days after the conviction of the co-defendants of murder in the first degree with penalty fixed at death, and after widespread publicity had been given to the case almost continuously from the day of the crime and particularly during the two weeks' trial of said co-defendants and, also, after public prejudice had become intensified against the defendants and after widespread publicity had been given to Judge Boyer's praise of the jury and the death penalties in the Foster-Zeitz trial. On June 14, 1948, the petitioner was found guilty of murder in the first degree and in his case, also, the jury fixed the penalty at death.[1]

On April 3, 1951, the petition for writ of habeas corpus upon which this appeal is based was filed in the District Court (5a-16a). Insofar as applicable to the instant appeal[2]

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[1] A history of the proceedings subsequent to said conviction and sentence is found in **United States, ex rel., Darcy vs. Handy, et al.,** 203 F. 2d, 407, 410-411, 420-421.

[2] The petition also alleged that Darcy was deprived of the rights guaranteed to him by the Fourteenth Amendment by reason of the lack of effective assistance of counsel. The Court, in its Per Curiam Opinion, 203 F. 2d 407, sustained the action of the District Court in denying the petition for habeas corpus based on this allegation.

the petition alleged that he was in custody in violation of the Fourteenth Amendment of the United States Constitution (28 U. S. C. A., Section 2241), because: (1) the petitioner was tried in an atmosphere of hysteria and prejudice, since the newspapers in Bucks County by their detailed and inflammatory front-page accounts of the crime and of the Foster-Zeitz trial and by their editorial policy literally demanding the death chair for the petitioner and his companions, had rendered impossible the impaneling of a fair and impartial jury in the Darcy trial, the petitioner having been put to his trial almost immediately,—3 days,—after that of Foster and Zeitz, who had been found guilty of first degree murder with death penalty; and (2) that Judge Calvin S. Boyer, the judge at the earlier Foster-Zeitz trial, who had already demonstrated prejudice against all robbers and who had publicly praised the jury in the Foster-Zeitz case for having fixed the penalty at death for the petitioner's co-defendants, frequently visited in the courtroom, and even attended a night session, during the petitioner's trial and, particularly, frequently appeared on the bench, together with Judge Keller, during Darcy's trial and, on one occasion, while sitting with Judge Keller, made a comment adverse to Darcy on a critical issue of evidentiary law, and participated in the consideration of the ruling made immediately thereafter adverse to Darcy's position, (R. 7a-10a).

On April 11, 1951, the District Court dismissed the petition without permitting petitioner to introduce evidence in support of his contentions. The District Court filed an opinion reported sub nom. *United States v. Handy*, 97 F. Supp. 930. Petitioner immediately took an appeal to the United States Court of Appeals for the Third Circuit.

In a per curiam opinion filed March 24, 1953, the majority of the court, (Biggs, C. J., McLaughlin, Kalodner and Hastie, J. J.), remanded the case to the District Court on

the issue of alleged hysteria and prejudice prevailing at his trial, including any issues raised by Judge Boyer's asserted visits to the courtroom during Darcy's trial and alleged participation therein (203 F. 2d 407-419).[3]

The petitioner thereupon filed a petition for rehearing pursuant to Rule 33 of the Court of Appeals. The rehearing was denied on April 29, 1953. Petitioner then filed in this Court a petition for writ of certiorari. This application was denied on October 26, 1953 (346 U. S. 865).

After the case was remanded, a hearing was held, with the petitioner present, before Hon. John W. Murphy, District Judge, on March 11, 12, 13, 16-20, 1954. The petitioner called 22 witnesses and offered 137 exhibits. The respondent called 11 witnesses and offered 6 exhibits.

The District Court, after said hearing, entered on February 12, 1955, an order dismissing the petition for habeas corpus on the ground that it was satisfied that petitioner's proof was insufficient to establish that his trial had been fundamentally unfair, 130 F. Supp. 270, (R. 1191a-1244a).

The matter was argued before the Court of Appeals en banc on April 4, 1955. Thereafter, in a divided 4-3 opinion, the Court of Appeals affirmed the judgment dismissing the petition. The majority opinion was written by Hastie, Circuit Judge, concurred in by Maris, Goodrich, and Staley, Circuit Judges. A dissenting opinion was filed by Kalodner Circuit Judge, which was concurred in by McLaughlin, Circuit Judge. A separate dissenting opinion was filed by Biggs, Chief Judge, (224 F. 2d 504; R. 1245-1267).

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[3] The matter was first argued on January 7, 1952 before a "three judge division", composed of Biggs, Chief Justice, Kalodner, Circuit Judge, and Burns, District Judge. Due to the seriousness of the alleged charges in the petition, the matter was reargued on December 1, 1952, nearly 11 months later, before the Court of Appeals en banc.

II.

Statement of Facts.

The proof adduced by petitioner that he had been tried in an atmosphere of passion, prejudice and hysteria, abetted by the excessive interest and participation by Judge Calvin S. Boyer, who was not the trial judge in petitioner's case, all in contravention of the Fourteenth Amendment of the United States Constitution, was as follows:

A.

The Local Press, By Editorials, News Stories And Comments, Prejudged Darcy's Case and Dictated An Out-Of-Court Campaign To Assure his Receiving The Death Penalty.

(a)

Prejudicial Newspaper Articles and Editorials:

Prior to Foster-Zeitz Trial:

"The *crime* Darcy and his associates had committed was a *brutal and notorious one.* There is no doubt that great animosity was stirred in the minds of persons in the vicinage by reason of the armed robbery and the murder of Kelly and that feeling ran high." Biggs, C. J., 203 F. 2d 407, at 414, footnote 8.

Newspaper Articles:

Immediately following the crime on December 22, 1947, there was a tremendous amount of newspaper publicity of an inflammatory nature. The four leading newspapers of Bucks County—"The Doylestown Daily Intelligencer", the "Bristol Daily Courier", the "Newtown Enterprise" and the "Quakertown Free Press"—by their articles and editorials reported every detail of this passion-arousing crime and dictated an out-of-court campaign to prejudice the citizens of Bucks County against the defendants and to demand the death penalty for them. The coverage of these newspapers was widespread throughout all sections of Bucks County.[1]

The *out-of-court campaign* carried on by these newspapers—and, particularly, "The Doylestown Daily Intelligencer"—to dictate the death penalty for the petitioner, as well as for the other defendants, commenced immediately

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[1] The population of Bucks County during 1947 and 1948 was 107,715 (Rel. Ex. 124, Pa. Manual 1947-1948). The "Doylestown Daily Intelligencer", a daily newspaper, was located in Doylestown Borough, the County seat, (pop. 5262), having a circulation in 1948 of 5329, primarily in the center of the county—Doylestown, Newtown, and parts of Montgomery Valley, although it was widely distributed throughout the county. The "Bristol Daily Courier", a daily newspaper, was located in Bristol Borough, (pop. 11,895), having common ownership with the Doylestown Daily Intelligencer, and had an average circulation of 5,307, primarily in eastern and lower Bucks County and, particularly, in Morrisville, Penndel, Bristol Twp. and Bensalem Twp. During this period, the "Bristol Daily Courier" received its news coverage of the crime, as well as of both trials, from the "Doylestown Daily Intelligencer". The "Newtown Enterprise", a weekly newspaper, was located in Newtown Borough, (pop. 2,009), having a circulation in 1948 of 1,972, within a five mile radius of Newtown. The "Quakertown Free Press", a weekly newspaper, was located in Quakertown Borough (pop. 5,150), having a circulation of 5,000, principally within a 25 mile radius of Quakertown. (R. 392a; R. 208a, R. 239a, R. 279a, R. 383a, R. 385a-387a; R. 273a, R. 389a-390a).

following the holdup and murder, grew in intensity and reached its climax with the reporting of the Foster-Zeitz trial.

The reports of the crime were detailed, headlined, front-page articles immediately following the murder on December 22, 1947,[5] reports of the crime were featured in many of the Doylestown Daily Intelligencer issues during January, February, March and April down to the date of the beginning of the Foster-Zeitz trial,[6] and *grew in intensity during the Foster-Zeitz trial*, reaching its climax in the Doylestown Daily Intelligencer issue of Saturday, June 5, 1948.[7]

The newspaper articles were uniform in their characterization of the defendants as "bandits", "thugs", "trigger happy youths" and "Philadelphians". The articles were more than newspaper coverage of a crime; they were in the nature of crusades against these defendants and other "outlanders", who dared to come into Bucks County to commit crimes.

Articles, editorials and comments were published in said newspapers from December 23, 1947, to May 22, 1948, continuously reminding the public of Bucks County of the heinous nature of the crime:

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[5] **Pre-trial Foster-Zeitz and Darcy:** Doylestown Daily Intelligencer: December, (6 issues), Rel. Exs. 12 to 22 incl.; January , (4 issues), Rel. Exs. 23 to 29 incl.; February, (6 issues), Rel. Exs. 31 to 42 incl.; March 1 and 2, (2 issues), Rel. Exs. 43 to 45 incl.; April 2, 3, 17, (3 issues), Rel. Exs. 46 to 48 incl.; Newtown Enterprise, Rel. Exs. 107, 108, January 1, 1948, (R. 953a-974a; R. 976a-981a; R. 982a-998a; R. 999a; R. 1001a; R. 1106a; R. 1108a).

[6] **Pre-Foster-Zeitz Trial:** Doylestown Daily Intelligencer: May 7, 12, 14, 19, (4 issues), Rel. Exs. 49 to 54 incl. (R. 1005a, R. 1007a).

[7] **Foster-Zeitz Trial:** Doylestown Daily Intelligencer, May 24, 25, 26, 27, 28, 29, (6 issues), Rel. Exs. 55 to 66 incl.; June 1, 2, 3, 4, 5, (5 issues), Rel. Exs. 67 to 79 incl. (R. 1009a-1040a; R. 1044a-1074a).

The Intelligencer issue of *December* 24, 1947, (Rel. Ex. 14-15; R. 959a, R. 963a), under the heading "*Bandits Admit Shooting Five Persons in Holdups*" referred to the defendants as "*trigger happy*" youths, quoted the petitioner as "*boastful*" and mentioned that they were *involved in a series of tavern robberies in the Bucks and Philadelphia Counties area.*

The Intelligencer issue of *December* 26, 1947, (Rel. Exs. 16-17; R. 964a, R. 966a), under the heading "Murder Now Faces the Four Bandits", in a subheading referred to the fact that "Dead Man Was Shot on Outside of Feasterville Inn When Bandits Fled After Shooting Two Other Men *Callously* During the Holdup".[8]

The Intelligencer issue of *December* 27, 1947, (Rel. Exs. 18-19; R. 967a-969a) in another headlined frontpage article referred to the prosecution of the "*Philadelphia's Four Young 'trigger happy' bandits.*"

The Intelligencer issue of *December* 29, 1947, (Rel. Ex. 21; R. 972a-973a) in a headline frontpage article, under the heading "Murder Victim Funeral Held Last Saturday" referred to the murder of Kelly—a "*Popular Citizen of Trevose Area*" and again referred to the four defendants as "*trigger happy bandits.*"

The Newtown Enterprise weekly issue of January 1, 1948, (Rel. Exs. 107-108; R. 1106a-1110a), under the frontpage heading: "*Easy Xmas Money Was Bandits Aim*" referred to the "Four Philadelphia Bandits Who Shot Up Two Taprooms in Lower Bucks County."

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[8] Under sub-heading **"Feeling Runs High"** it is stated: "The general feeling of the public—in Bucks County at least—appears to be that no time should be spared in bringing the youthful bandits to trial, and that it is a **'break' for society** at large to have the trials in Bucks County rather than in Philadelphia (R. 965a, R. 966a).

Editorials:

Simultaneously with the coverage of the crime, there commenced in the Doylestown Daily Intelligencer *an editorial policy* designed to secure the electric chair for the youths involved in the Feasterville Inn holdup. Said editorial campaign started with the editorial, headed: "*Fast Police Work*" in the Intelligencer issue on *December* 27, 1947. (Rel. Ex. 20; R. 970a-971a)." This editorial especially condemned a Philadelphia jury, which had recently given the killer of two cops life imprisonment instead of the electric chair. Shortly thereafter another passion-arousing editorial headed "*Errors of Jurors*" appeared in the Intelligencer issue of *December* 31, 1947. (Rel. Ex. 22; R. 974a-975a). This editorial referred to "*Criticism of the Inefficiency of Jurors*"

FAST POLICE WORK

THE ROUNDINGUP of the young gunmen who robbed the Feasterville and Penndel cafes and admitted many other robberies, is something for which we can thank the police of the county and Philadelphia.

What the public and the police will be watching closely is what is done to these potential killers when they come before the bar of justice.

One of the victims of the **callous shootings** has since died.

Something else that is particularly worth while remembering is the statement of one of the witnesses that one of the **young gunmen** remarked that it was lucky that no State Police were on the scene, because they also would have been shot.

When we stop to consider the number of policemen who have been killed by **trigger-happy bandits,** it is not difficult to believe that the gangster meant what he said.

We have always wondered why the police so often take chances with wanted men who are known to be gun-toters and potential killers.

It is especially surprising in view of the miscarriage of justice in Philadelphia recently * * * when a jury predominantly made up of women, gave the killer of two cops life imprisonment instead of the electric chair, especially in view of the previous record of the killer (R. 970a, R. 971a).

and stressed that particularly in murder cases, "*juries frequently render verdicts that it is difficult to explain*". This editorial did not advise the reader that each case must be decided under the evidence and under the law.

The newspaper publicity of the offense did not diminish in its intensity within a week or two after the crime. Periodically, until almost preceding the Foster-Zeitz trial, there appeared reminders of the holdup and killing, as well as other holdups in which these youths had been involved, and also reminders of the danger of leniency in dealing with these defendants.

"The Gossiper" column in the Intelligencer issue of January 16, 1948, (Rel. Ex. 25, R. 979a), stressed that if "*Courts and jurors were to dispense with a lot of the sentimentality about criminals * * * the general public would not face so many horrible crimes as horrify newspaper readers daily.*"

An editorial in the Intelligencer issue of February 2, 1948, (Rel. Ex. 31; R. 982a-983a) headed "*Who'll Be the Next*" referred to the current gruesome story appearing in the metropolitan newspaper describing the brutal beatings of aged men and women in their shops by holdup men. The editorial stressed that "If juries and courts will make examples of these cowardly enemies of society there will be fewer of their assaults. * * * *It would be lamentable if citizens were forced to take the punishment of them into their own hands*" (R. 983a). (Italics supplied.)

The Intelligencer issue of February 6, 1948, (Rel. Exs. 34-35; R. 984a-988a) contained an article headed "*Less Power for Juries,*" under a Harrisburg dateline, and discussed a Philadelphia judge's "proposal to relieve juries of the power to fix penalties in cases involving first degree murder" on the ground that jurors "do not know how to exercise it" (R. 984a, R. 985a).

The Intelligencer issue of February 10, 1948, (Rel. Exs. 36-37; R. 989a-991a), under the heading "Four Youths In-

dicted for Feasterville Murder" again reported on the front page the passion-arousing details of the crime. The article referred to the precautions taken by the four State Troopers, the sheriff, two deputy sheriffs and county detectives to keep these "trigger happy bandits" in custody while being brought from the Bucks County Prison to the courthouse (R. 989a, R. 990a).

Almost simultaneously with the indictment there appeared in the Intelligencer issue of February 11, 1948, (Rel. Ex. 38; R. 992a-993a), an editorial designed to arouse the passions of the readers. The editorial entitled "*Enraged Citizens*" condemned leniency by courts and juries in dealing with criminals and stated that although "*Mob law* is not the kind we want in this country * * * but there probably were thousands of women, * * *, who felt like cheering when they read that" a convicted rapist, who had been merely fined $25.00 had been "*tarred and feathered.*"

The Intelligencer issue of February 16, 1948, (Rel. Exs. 40-41, R. 995a-997a), carried the frontpage headlined article "Police Connect Six Bandits Arrested Here to a Number of Robberies and Holdups" and in heavy type headlined that "They Also Know Members of the Boy Murder Gang."

Another frontpage article of the same issue, (Rel. Ex. 40; R. 994a), under the heading; "10 *Young Problems*" stressed that "Something to worry about in the way of Juvenile Delinquency has been furnished by ten Philadelphia boys now incarcerated in the Bucks County Prison," and that "Four of the Boys Are Charged With Murder."

Two days later in the Intelligencer issue of February 18, 1948, (Rel. Ex. 42; R. 998a), an editorial appeared, headed "*Time For an Example.*" It stated that "The Overflow of Philadelphia's Young Criminals Into Bucks County Might, It seems Reasonable to Believe, Be Discouraged if the Crooks were given Sentences which would be impressive and get Headlines Large Enough to be Seen and Become

Impressive. *Stiff Sentences have had that effect before.*

The Intelligencer issue of March 1, 1948, (Rel. Ex. 43; R. 999a-1000a), under the heading "Charged With Murder, Asks Separate Trials," quoted Judges Keller and Boyer as preferring "to have a combination trial if possible, covering all defendants" and as being critical of the petitioner's application for a separate trial on the ground that "separate trials in these cases will mean that it may take a year to dispose of the cases."

The Intelligencer issue of April 2, 1948, (Rel Ex. 46; R. 1001a-1002a), contains a reprint of an editorial of the Philadelphia Inquirer, entitled "*Mild Sentence For Murder*," showing an editorial policy against leniency in murder cases and against considering each case upon the facts and law thereof.

The most inflammatory editorial is that headed: "*If Sob Sisters Lay Off*" in the Intelligencer issue of April 17, 1948, (Rel. Ex. 48; R. 1003a-1004a). The editorial quoted Judge Harry McDevitt, of Philadelphia, as telling three holdup men, whom he had sentenced to from 10 to 30 years, that: "You wise guys start out with guns and usually wind up in the electric chair." The editorial commented that: "Unfortunately * * * there still are Judges and Pardon Boards not yet convinced that thugs of that type should not be given an early opportunity to prey on the public. It seems to be time to stop making guinea pigs of the lawabiding members of society."

The editorial policy against lenient sentences appears again in the Intelligencer issue of May 7, 1948, (Rel. Ex. 49; R. 1005a-1006a). In an editorial headed: "*Jurors Rebuked Again*," this editorial referred to a judge in Philadelphia having twice rebuked a jury for soft-hearted decisions. It further commented that:

> "It makes it more and more apparent that untrained men and women, not familiar with court rules or the

proper weighing of evidence are lacking in temperament or ability to serve efficiently."

During Foster-Zeitz Trial:

The trial of petitioner's two companions, Foster and Zeitz, started on Monday, May 24, 1948, and ended on Friday, June 4, 1948. This trial was highly publicized in the newspapers, which were distributed throughout Bucks County —all in headlined frontpage articles.

The Intelligencer each day carried detailed accounts of all phases of the case, from the voir dire examination of the jurors, to the almost verbatim testimony of each eye witness at the Feasterville Tavern holdup, to the almost verbatim demand for the death chair by the District Attorney in his closing summation.

The news coverage of the trial was more than fair comment on what transpired in the courtroom. The articles were dramatic and passion-arousing.

The Intelligencer issue of May 24, 1948, (Rel. Exs. 55-56; R. 1009a-1012a) carried the frontpage feature: "Feasterville Murder Case Defendants Go on Trial." Curiously, this article again reported: "Only two of the defendants charged with the murder will go on trial this term. * * * The other two defendants, David Darcy, 22, and Felix Capone, 16, will be tried at a later term of court." The article referred to Foster and Zeitz having been "* * * brought into court by two State Troopers * * * other guards and Sheriff's deputies were stationed nearby * * *."

The Intelligencer issue of Tuesday, May 25, 1948, (Rel. Exs. 57-58; R. 1013a-1017a), again gives a play by play description of the selection of the voir dire examination of the jurors, and the names of the jurors selected were boxed on the frontpage under the heading: "KELLY MURDER

JURY." This article also refers to the fact that: "Two other defendants will be tried for the same crime at a later term of court * * * David Darcy, 22, and Felix Capone, 46, also Philadelphians." It stated the defendants were charged with holdups in Philadelphia, Montgomery and Delaware Counties and in South Jersey, in one of which holdups a Philadelphia city fireman had been shot.

The same issue of the Intelligencer, (Rel. Ex. 57; R. 1018a), carried a frontpage article entitled: "*MERCY IS OVERDONE*," under a Washington dateline, quoting Mr. Justice Robert H. Jackson of having accused his Supreme Court colleagues of giving hardened criminals too many chances of getting out of jail.

The May 26, 1948, issue of the Intelligencer carried another headlined frontpage article (Rel. Exs. 59-60; R. 1019a-1023a), and the names and addresses of the jurors selected appear in heavy block type on the front page under the heading: "Zeitz-Foster Murder Jury." The article refers to the trial of "Two *Philadelphia* Youths Charged With the Murder of William Kelly." The article referred to Judge Boyer having issued a special venire of 50 jurors to be returned the following morning, the original panel having been exhausted.

The Thursday, May 27, 1948, issue of the Intelligencer, (Rel. Ex. 61; R. 1024a), contained a frontpage photograph headed "MURDER DEFENDANTS ON THE WAY TO COURT," with the notation: "Handcuffed to police are two Philadelphia youths on trial in the Bucks County Court House * * *." The photograph shows the defendants handcuffed to two state troopers, sheriff and deputy sheriff. The same issue, (Rel. Exs. 61-62; R. 1025a-1030a), carried the headlined frontpage story entitled: "128 Jurors Called in Murder Trial, But Only 11 Seated," and again carried a blocked list of the "ZEITZ-FOSTER MURDER JURY." The article referred to the fact that: "The fourth day of

the trial opened this morning shortly after 10 o'clock and still the case had not been opened to the jury by the Commonwealth * * *." Much was made of the exhaustion of the second venire of the jurors and of the necessity for calling a third venire.

The Friday, May 28, 1948, issue of the Intelligencer, (Rel. Exs. 63-64; R. 1031a-1037a), carried the headlined frontpage article entitled "JURORS VISIT MURDER SCENE, TESTIMONY IS UNDER WAY, LANDLORD IDENTIFIES THREE." The article refers to the "Trial of two members of a Philadelphia Boy-Bandit Gang that *killed a Trevose man, made a cripple out of another man for life*, and injured several others in a holdup at the Feasterville Inn last December 22." The article quotes District Attorney Biester as having "Left little doubt in the minds of those who heard him that when he makes his next speech to the jury the Commonwealth will ask for the death penalty." The article refers to Kelly (the deceased) as "a highly respected citizen of his home community. * * *." The article stated that: "It took exactly 147 jurors to get the 14 required for this trial. It took 17 hours of questioning. * * *." The article carried the names and detailed accounts of the testimony of the various witnesses. One witness, John R. Naysmith, a spectator at the holdup, was reported as testifying: "I saw Zeitz and Foster in front of the bar, I also saw David Darcy there." *Repeated references were made to the activities of Darcy during the holdup*, including "I heard Darcy ask where the hero was that hit me * * * 'Where are the police': I feel like shooting a couple of them", (R. 1031a; R. 1032a, R. 1033a, R. 1034a, R. 1035a, R. 1036a).

The May 29, 1948, issue of the Intelligencer, (Rel. Exs. 65-66; R. 1038a-1043a), carried the frontpage headline: "*Heard Feasterville Bandits Say They Would Also Like To Have Sho; 'Some Cops*" The article referred to:

"The horror of the Feasterville's Tavern Murder during last year's Christmas Season, when an innocent outsider was fatally shot, is being related in detail again today in Bucks County Criminal Court."

"The spectacle of a quartet of wise-cracking trigger happy young bandits who invaded the Feasterville Inn last December 22, at night, shooting down patrons *'just for the fun of it'* was described from the mouths of numerous Commonwealth witnesses all day yesterday."

The article referred to "Hardboiled behavior of the gang that held up 18 patrons before the murder. Two others charged with the same offense will be tried later." Again the detailed testimony of the Commonwealth witnesses was given as to the passion-arousing details of the crime, wherein *time and time again the name of Darcy and his conduct appeared, although Darcy was not then on trial.*

The Monday, June 1, 1948, issue of the Intelligencer, (Rel. Exs. 67-68; R. 1044a-1048a), in a frontpage article headlined: *"Why Did They Shoot Me? Murdered Man Asks After He Was Victim in Feasterville Shooting,"* starts with this passion-arousing paragraph: "Crippled for Life, a 46-year-old Philadelphian was wheeled into court this morning on an invalid chair." The article reported Hellerman as testifying that he "was playing shuffle board in a side room of the Inn when David Darcy, 22,—who will be tried later—came in and fired two shots." *Repeated references were made to Darcy's conduct during the shooting.* Hellerman is quoted as testifying "I have pain all of the time in my legs, I no longer have normal control of my organs. I can move my hands but not my legs."

The Tuesday, June 2, 1948, issue of the Intelligencer, (Rel. Exs. 70-71; R. 1048a-1054a), another frontpage article headed: "Zeitz Admits Firing Two Shots Out of Auto" starts "'You ought to try this some time * * * it's a lot of fun' a

16-year-old Philadelphia boy-bandit, remarked to patrons of Deacon's Inn near Penndel during a pre-Christmas holdup last December, less than 30 minutes after a holdup and murder at nearby Feasterville." The article referred to the "trigger happy bandits," "four Philadelphians," including "Darcy, * * * who will be tried later." The article stated: "Slowly, but carefully, the Commonwealth is leading up to the point when it will ask that the jury demand that Zeitz and Foster pay with their lives for the death of William Kelly." The article referred to Assistant District Attorney Curtin's having read an 8-page typewritten statement of all defendants to the jury. The statements mentioned that "All four defendants said everything in the statement was true." *The article further refers to other holdups committed by Darcy and his companions*, in one of which holdups he was referred to as having stated: "That he had just shot a couple of men at another place."

The Newtown Enterprise issue of June 3, 1948, (Rel. Exs. 109-110; R. 1111a-1116a), reported in a frontpage article the passion-arousing details of the crime under the headline: "Youths Escapade Ends in Murder." It referred to:

> "The sordid tale of thrill-seeking youths whose escapade ended in murder is in its second week in criminal court at Doylestown * * * of the hardboiled behavior of the gang that held up 18 patrons before the murder. Two others charged with the same offense will be tried later * * *."

This article, like the daily accounts in the Intelligencer, *stressed Darcy's roll in the holdup.*

The Thursday, June 3, 1948, issue of the Intelligencer, (Rel. Ex. 72; R. 1055a), in another frontpage article headed: "*Prosecutor's Plea*" quotes District Attorney Biester in his summation to the jury, as having declared:

> "*Morally*, these boys, Zeitz and Foster, *killed three men* the night of the Feasterville holdup" * * * "William Kelly was mortally wounded by a shot from the bandit gun, and the two others were horribly crippled, one for life", * * * "Even a surgeon's knife cannot restore one of the victims to normal life."

The District Attorney also emphasized the fact that the defendants' callousness was outrageous when the bandits wished the victims of a holdup, "a Merry Christmas" before leaving the Feasterville Inn shooting escapade:

> "Not satisfied with the Feasterville Affair, they went to another place the same night and held it up with guns. *What one did, was the attitude of all.*"

The same issue of the Intelligencer, (Rel. Exs. 72-73; R. 1056a-1061a), carried another frontpage article headed: "Defense in Murder Trial Decides Not To Offer Evidence." This article stated: "* * * Sensational 30-day crime spree that ended in a murder * * *." Later in the article it is stated: "Seven shootings, one a fatal affair, during a 30-day hold-up spree, were enumerated in court as the written documents were read by Assistant District Attorney Willard S. Curtin", (R. 1059a). The article stated that:

> "Seven persons were shot, one was murdered and nine places were held up by the four accused Philadelphians, according to the statements submitted in evidence in court yesterday, and signed by Zietz, Foster, Darcy and Capone."

This article is basically incorrect inasmuch as Darcy did not participate in four of the holdups and the statements submitted clearly so state.

The Friday, June 4, 1948, issue of the Intelligencer, (Rel. Exs. 75-76; R. 1062a-1066a), in a frontpage article headed

"FATE OF ZIETZ AND FOSTER IN JURY'S HANDS," referred to the defendants as two "trigger happy Philadelphia youths" and to the "brutal killing of William Kelly." The article gives excerpts of *Judge Boyer's charge* to the jury, *including a statement that "in his opinion the death penalty is warranted in this case."* Included in the excerpts of Mr. Biester's summation were his comments that these boys are *"not normal American boys,"* and that "they were as brazen as they could be during this trial and during their escapades of crime."

The Saturday, June 5, 1948, issue of the Intelligencer, (Rel. Ex. 78; R. 1071a-1072a), published and circulated—*two days before the petitioner's trial*—several front page articles. The featured article was headed:

> "JUDGE BOYER PRAISES JURY FOR VERDICT CONDEMNING 2 KILLERS TO ELECTRIC CHAIR. Court Tells Eight Men and Four Women He Could Not See How Any Other Course Could Have Been Taken —Two Defendants Appear To Be Unmoved."

Another frontpage article of this Saturday, June 5, 1948, issue was headed, "Two Young Killers Turn To Bible For Comfort", (Rel. Exs. 78-79; R. 1068a-1069a). This article referred to the convictions of Foster and Zeitz by a Bucks County Jury * * * *Who wasted no time on their deliberation* before returning a verdict of guilty of murder in the first degree with death penalty recommended." This article referred to the costs of the prosecution to the county.

Another frontpage article of said Saturday, June 5, 1948, issue, (Rel. Ex. 78; R. 1070a), was headed:

> "HELD FOR BURGLARY.
> 3 Youths Lived Near Zietz and Foster"

The article referred to the arrest of three Philadelphia youths, including Robert White, 18, and *merely referred to*

the fact that they lived in the vicinity of an inn that was held up by the two convicted murderers, who were sentenced to death here, the preceding day.

Finally, in the same issue of Saturday, June 5, 1948,—*two days before the petitioner's trial started*—under the column, "We Noticed", appeared two articles, (Rel. Ex. 79; R. 1074a). The first mentioned the "thousands of dollars it cost the taxpayers to capture, try and convict just two of the *trigger happy bandits* recently convicted and sentenced to the electric chair." The second article quotes a police official as saying that: "* * * *If the killers of Kelly were not given the death sentence, the electric chair should be destroyed.* * * * *and his opinion being agreed with by those who heard the statement.*"

Prior to Selection of Darcy Jury:

The Intelligencer issue of Monday, June 7, 1948, (Rel. Exs. 80-81; R. 1075a-1078a), which was published and circulated on the day when the selection of the Darcy jury began, contained a frontpage article headed: "UP TO LATE HOUR THIS A. M. NO JUROR HAD BEEN GOTTEN FOR DARCY MURDER TRIAL." The article referred to the petitioner "Whose partners in crime * * * were found guilty last Friday and sentenced to die in the electric chair. * * *" as having gone on trial that morning in Judge Keller's Court. The defendants were referred to as a "trigger happy gang." The article states:

> "From the start of the questioning of jurors this morning, it was evident that great difficulty will be met in selecting a jury.
>
> "Jurors informed the Court that they had read a lot about the case and a number said that they had

'formed a fixed opinion that could not be changed by the evidence.'"

The Intelligencer issue of Tuesday, June 8, 1948, (Rel. Exs. 82-83; R. 1080a-1085a), contained another frontpage article "JUROR BEING QUESTIONED THROWS BOMB SHELL IN COURT." The article referred to a prospective juror's statement on voir dire examination that "* * * *It's the coldest blooded murder that I ever read about.*" The article referred to Darcy as a member of: "A four-team Philadelphia bandit gang that shot up the Feasterville Inn * * * and then held up the Deacon's Inn at Penndel" on December 22.

The same, June 8, 1948, issue of the Intelligencer, (Rel. Ex. 84; R. 1086a), contained a Guest Editorial from the Philadelphia Evening Bulletin entitled "TWO MURDER CONVICTIONS." The editorial commended the Doylestown jury for not being subject to "*maudlin sympathy*" in failing to recommend the death penalty and cited the *Foster-Zeitz verdict as "a vindication of women as jurors.*"

The foregoing newspaper articles and editorials constitute convincing proof of the policy of the press to secure a death penalty in the petitioner's trial. They crystallized the public sentiment and indignation that existed in Doylestown and in Bucks County on June 7, 1948, when the voir dire examination of the jury panel commenced.

Magazine Article.

The publicity following the Feasterville holdup on December 22, 1947, was so widespread in scope and intense and passion-arousing in nature that it culminated in a magazine article entitled: "*KILL-CRAZY*" in the June 1948, issue of a popular sensational national magazine known as "*Front Page Detective*," (Rel. Ex. 136). This article contained a detailed account of the Feasterville holdup and murder, as well as of other holdups, in some of which Darcy was not involved, together with the pictures of the petitioner and the other defendants. *The article being local in interest, was necessarily circulated and widely read throughout Bucks County* (R. 557a-560a; R. 567a-575a; R. 589a-592a; R. 601a-602a).

This magazine was seen in the courtroom during the petitioner's trial in the hands of courtroom spectators (R. 557a-560a; R. 567a-575a; R. 581a-592a; R. 601a-602a).

C.

Radio and Television.

There was wide radio and television coverage both of the holdup and apprehension of the defendants, as well as of the Foster-Zeitz trial. Radio Station WFIL, of Philadelphia, with a broadcast radius covering all of Bucks County, (R. 281a-286a), and Radio Stations WBUS, of Doylestown, (R. 287a-288a), and WBUX of Quakertown, all carried detailed reports of the Foster-Zeitz trial. The Quakertown Free Press issue of May 27, 1948, (Rel. Ex. 123(c);

R. 1125a-1126a), contained a frontpage article headed: "COURT NEWS POPULAR WITH WBUX LISTENERS." The same newspaper's issue of June 10, 1948, (Rel. Ex. 123(d) (e); R. 1127a-1128a), in another frontpage article stated:

> "The murder trials at the courthouse, Doylestown, are being covered by WBUX reporters, and at noon and evening the undertakings of the court are read over the air", (R. 1128a).

D.

The Newspaper Campaign Resulted In Public Passion, Prejudice and Hysteria, Demanding the Death Penalty, Irrespective of the Evidence.

The *campaign to assure the death penalty* for these youths *was crystallized in the expressions of public sentiment* generated by said newspaper articles and editorials, as well as by the radio and television broadcasts. There was a widespread popular sentiment in all sections of Bucks County that all the defendants involved in the Feasterville holdup should be sentenced to the electric chair, *irrespective of the evidence and the law in each case.* This popular sentiment against these youths *permeated throughout the entire Bucks County*, (R. 124a-133a; R. 159a-179a; R. 181a-207a; R. 253a-272a; R. 314a-340a; R. 431a-473a; R. 585a-605a).

The petitioner called seven witnesses to substantiate the contention as to the public sentiment of prejudice and hysteria: Rev. Frank J. Damrosh, St. Paul's Episcopal Church, Doylestown, Pennsylvania, (R. 124a-133a); *Rev. William Babinsky*, of Feasterville, Pennsylvania, Pastor of the Dutch Reformed Church of America, (R. 159a-179a); *G. Coe Farrier*, an attorney and former city solicitor of Philadelphia,

(R. 181a-207a); *Dr. Carl J. Hoffman*, of Philadelphia, a psychiatrist, (R. 253a-272a); *Howard R. Price*, of Charlottesville, Virginia, formerly of Andalusia, Bucks County, an auto parts salesman, (R. 314a-340a); *Miss Alice Patterson*, of Margate, New Jersey, (R. 392a-419a); *Knickerbocker Davis*, Doylestown, Pennsylvania, a journalist, (R. 431a-473a); *Mrs. Inez Darcy Heckman*, a sister of the petitioner, (R. 585a-605a).

These witnesses, in effect, testified that the public sentiment against the petitioner and his companions prior to the petitioner's trial was that they "*should be hanged*," "*ought to be shot*," "*ought to be stamped out like bugs*", (R. 166a), "*should burn*", (R. 188a, R. 203a), "*ought to be hanged*," or "*get the chair*", (R. 257a), "should be lynched, hanged or shot" (R. 318a, R. 438a), "should burn", (R. 394a-395a), should get the "hot seat," or should be "taken out and shot or strung up", (R. 436a), and "did not deserve a trial", (R. 438a, R. 587a), but "should be strung up", (R. 588a).

Mr. Knickerbocker Davis, a magazine writer, and former newspaper correspondent, testified that he was interested in the problem of juvenile delinquency, and that after the Feasterville holdup on December 22, 1947, he *made an independent survey of public opinion of the crime in the Borough of Doylestown and its environs as far as New Hope*. Mr. Davis' survey showed that 70% of the 100-150 persons interviewed by him were shocked and outraged by the crime, and were of the opinion that the participants deserved the death penalty, (R. 433a-435a; R. 438a; R. 441a-443a; R. 448a).

The public sentiment and indignation against these defendants was generated not only by the type of the crime involved, but also by the fact that the participants were Philadelphia youths who had entered Bucks County to commit the holdups with which they were charged. The

newspaper articles and editorials above designated make frequent references to the fact that the defendants were Philadelphians who had made "criminal forays into Bucks County," and the popular sentiment generated by said newspaper articles and editorials reflect the public indignation against the "*outlanders*" from Philadelphia. (R. 259a, R. 260a, R. 318a, R. 333a-337a; R. 394a-396a).

E.

Relisting of Darcy Trial.

Originally the petitioner's trial was not scheduled to be held until the term following the trial of Foster and Zeitz. Suddenly, on June 4, 1948, at the end of the Foster-Zeitz trial, it was decided to hold the Darcy trial immediately on the completion of his companions' trial.

It is uncontradicted that both Judges Boyer and Keller were desirous of having a joint trial of all defendants in order to save time and expense. Both judges were opposed to petitions by Darcy and Capone, asking for separate trials. (Doylestown Daily Intelligencer, Monday, March 1, 1948); (Rel. Ex. 43; R. 999a-1000a).[10]

Thereafter, Darcy and Capone were granted separate trials, pursuant to the Pennsylvania Act of March 31, 1860, P. L. 427, Section 40, (19 Purdon's Penna. Statutes Annotated, Section 785).

The newspapers until Friday, June 4, 1948, reported unequivocally that the Darcy trial was not to be held during the same term of court as the trial of Foster-Zeitz. The

[10] The judges were quoted as desirous of having "a combination trial if possible, covering all defendants" and as commenting that "Separate trials in these cases will mean that it may take a year to dispose of the cases," (R. 1000a).

Intelligencer issue of *Friday, May* 14, 1948, (Rel. Ex. 51; R. 1007a-1008a), commented: "* * * but only two will be tried during the approaching term * * * David Darcy and Felix Capone will be tried later." The Intelligencer issue of *Monday, May* 24, 1948, (Rel. Exs. 55-56; R. 1009a-1012a), stated that: "* * * only two of defendants charged with the murder will go on trial this term * * * Other two * * * tried at later term of court." This statement is reiterated in the issues of *May* 25, 1948, (Rel. Ex. 57; R. 1014a); of *May* 28, 1948, (Rel. Ex. 64; R. 1034a); *May* 29, 1948, (Rel. Ex. 65; R. 1033a), June 1, 1948, (Rel. Ex. 67; R. 1044a), *and June* 2, 1948, (Rel. Ex. 70; R. 1049a). *None of the articles mentioned that Darcy's trial was to start immediately after that of Foster and Zeitz.*

Neither District Attorney Biester, nor Assistant District Attorney Curtin, *repudiated the stories* published by the newspapers as a fact that the petitioner would be tried at the next term of court, (R. 795a; R. 897a-898a).

The Doylestown High School graduation exercises, which for years had been held in the Bucks County Court House, were rescheduled and transferred from the Court House only at the completion of the Foster-Zeitz trial, because according to the Intelligencer, Friday, June 11, 1948, (Rel. Ex. 93), "So many murder trials are cluttering up the Bucks County Criminal Docket * * *".

F.

Darcy Jurors Present in Bucks County Court House on June 1, 1948, During Foster-Zeitz Trial.

The records of the Bucks County Criminal Court show that the traverse jury selected to report on June 1, 1948, did so report in the Bucks County Court House on that date.

Rel. Exs. 10 (c) and (d); R. 949a, R. 952a). The jury that was summoned to appear on June 1, 1948, was not summoned specifically to serve on petitioner's trial, but was summoned generally to serve for the term commencing June 1, 1948, (R. 949a). These jurors were in the court house during the Foster-Zeitz trial and, in fact, some were on that date excused from jury service, (R. 952a). These jurors certainly had the opportunity to attend the sessions of the Foster-Zeitz trial. One, talesman Slaughter, testified that in fact he had been present in court during some of the days of said trial, (R. 1143a).

G.

So Aroused Was the Public Prejudice and Hysteria That It Was Difficult to Impanel a Jury for the Foster-Zeitz Trial.

The public prejudice and hysteria against the youths involved in the Feasterville holdup was rekindled and intensified with the *efforts to impanel a jury to try the case against Foster and Zeitz.* The Bucks County Criminal Court records indicate that the original jury panel summoned to serve on this case was exhausted before a jury was selected, (Rel. Exs. 10(a)-10(g)). The Court thereupon directed that a *special venire* be issued, and the Sheriff summoned and returned from the bystanders and the county at large 50 qualified persons, (Rel. Exs. 10(g)-10(h)). Thereafter, the Court found that, by reason of challenges and otherwise, *both the original panel of 120 jurors and the additional panel of 50 jurors had been exhausted without a jury being selected.* The Court thereupon issued *another order* directing the Sheriff to summon from the bystanders or from the County, 25 additional persons which he promptly did, (Rel.

Exs. 10(g)-10(h)). 142 *persons were examined before a jury of* 12 *jurors* and two alternates were finally selected to serve on the Foster-Zeitz trial, (Rel. Ex. 10(k)).

II.

The Public Prejudice and Hysteria Rekindled During the Foster-Zeitz Trial Became Intensified During the Selection of the Darcy Jurors.

The Feasterville holdup naturally aroused great public indignation throughout Bucks County. The atmosphere of prejudice and hysteria resulting grew in intensity and reached its climax during the selection of the jurors to serve on the petitioner's trial, *so that before the jury was even selected the petitioner was prejudged guilty and deserving of the death penalty. It was impossible for the Commonwealth to isolate the jury panel from which the Darcy trial jury was selected from the highly publicized Foster-Zeitz trial.* As stated, the Criminal Court records of Bucks County show that this jury panel *appeared in the court house on June* 1, 1948, and that they had the best available opportunity to hear and observe that case.

In fact, one talesman, Harry T. Westlake, when asked whether he had formed an opinion as to the petitioner's guilt or innocence, threw a "*bombshell*" into the courtroom when he stated, in the presence of three other jurors who had already been selected for service, that:

> "* * * *It is one of the most cold-blooded murders I ever heard of*", (Rel. Ex. 5A; R. 1141a-1142a).

According to the record of voir dire examination of prospective jurors in the Foster-Zeitz trial, 142 jurors were examined on May 24, 25, 26 and 27 before the jury was

completed. 80 jurors were examined on the voir dire examination in the Darcy trial on June 7 and 8, 1948 before the jury was completed. *In short, a total of 222 jurors were examined on voir dire examination in both trials before the juries were completed.* Both juries were selected from all sections of Bucks County and reflected the public sentiment of their respective sections.

(a)

Analysis of Voir Dire Examinations.

An analysis of the voir dire examination of the jurors called for the Foster-Zeitz case shows:

Foster-Zeitz Case

	Read Newspapers	Discussed Case	Fixed Opinion
Jurors examined—	142	142	142
Not asked question—	52	62	64
Asked question—	90	80	78
Answered No—	32	48	62
Answered Yes—	58	32	16
Percentage of those asked answering yes—	63%	40%	20%

An analysis of the voir dire examination of the jurors called for the Darcy case shows:

Darcy Case

	Read Newspapers	Discussed Case	Fixed Opinion
Jurors examined—	80	80	80
Not asked question—	21	36	25
Asked question—	59	44	55
Answered No—	7	22	39
Answered Yes—	52	22	16
Percentage of those asked answering yes—	89%	50%	30%

An analysis of the voir dire examination of the jurors called for both cases shows:

	Read Newspapers	Discussed Case	Fixed Opinion
Foster-Zeitz Jurors	63%	40%	20%
Darcy Jurors	89%	50%	30%
Change between trials	26%	10%	10%

Thus, in the petitioner's trial, approximately one-third of the jurors called to try him who were asked the question whether they had fixed opinions, stood up in open court and said that they had fixed opinions, derived from reading newspapers and hearing the case discussed.

An examination of the testimony taken on voir dire examination in the petitioner's trial reveals a remarkable increase in intensity and fixity of opinion—*the crystallization of public sentiment against the petitioner was apparent.*

I.

Judge Boyer's Excessive Interest, Attendance and Participation in the Petitioner's Trial Deprived him of a Fair Trial and Constituted a Denial of Due Process.

Judge Calvin S. Boyer, who presided at the Foster-Zeitz trial, evidenced his personal antagonism and hostility against all of the defendants—at least from the date of the presentation of petitioner's petition for severances.

The Intelligencer issue of Monday, March 1, 1948, (Rel. Ex. 43; R. 999a-1000a), quoted Judge Boyer and Judge Keller as commenting that:

> "Separate trials in these cases will mean that it may take a year to dispose of the cases."

After the Foster-Zeitz verdict, the Intelligencer issue of Saturday, June 5, 1948, (Rel. Ex. 78; R. 1071a-1072a), quoted Judge Boyer as praising the jury for its verdict condemning the "two killers to electric chair."

The Intelligencer issue of Saturday, June 12, 1948, (Rel. Exs. 94-95; R. 1094a-1096a), under the heading on the front page:

"JUDGE BOYER WARNS THAT BUCKS COUNTY IS TIRED OF THIEVES FROM PHILADELPHIA."

and the sub-heading headed:

"Court Warns Youth That County Intends to Do Something About It—Asks Defendant Whether He Wants to Get Into Position of Killers Who Were Sentenced to Electric Chair."

quotes Judge Boyer as asserting that:

> "We don't propose to nail all our property fast here in Bucks County just because thieves from Philadelphia want to pick up everything which isn't being watched * * * What business did you have to come up here in the first place?"

Judge Boyer's comments were made in connection with the sentencing of an 18-year-old Philadelphian, Robert White, who had pleaded guilty to stealing a car radio. He is quoted as having further stated:

> "We in Bucks County are tired of you Philadelphians who don't know how to behave. We have to bear the expense and we propose to stop it". (R. 1094a, R. 1095a).

The foregoing newspaper articles characterized his antagonism and prejudice against all the youths involved in the Feasterville Tavern holdup.

His antagonism was crystallized in the editorial which appeared in the Intelligencer issue of Thursday, June 17, 1948, (Rel. Ex. 105; R. 1103a-1104a), under the heading: *"RAUS MIT 'EM."* Apparently, the newspaper recognized the significance of "Judge Calvin S. Boyer's warning to tough crooks from Philadelphia and other places to keep out of Bucks County or take the consequences." The editorial continued:

> "The warning has been given before, but not under such impressive circumstances.
>
> "At any rate the jurors in the Feasterville slaying case probably indicated the reaction of people in this county to the vicious lawlessness of a great many young crooks who have operated in the county.
>
> * * *
>
> "The conviction of the three young men for a wanton and unprovoked murder * * * and the imposition of

the death sentence * * * together with Judge Boyer's warning * * * it is hoped will cause bandits and killers to steer clear of the county.

"Getting tough has worked that way in other instances."

This editorial recognized that the verdict was an indication of not only Judge Boyer's personal sentiments but also of other Bucks Countians "* * * that leniency has merely been taken as an indication of weakness * * *".

Mr. Knickerbocker Davis testified that during the Foster-Zeitz trial Judge Boyer had told him that he thought the defendants were "hardened" and "callous criminals", (R. 446a-448a).

Judge Boyer's attendance and participation at Darcy's trial must be taken into consideration with his expressed personal sentiments—a deep-seated antagonism and prejudice against "outlanders" and killers. The records of the Bucks County Criminal Court indicate that, although Judge Keller did not participate in any phase of the Foster-Zeitz trial which had been presided over by Judge Boyer, that Judge Boyer actively participated, together with Judge Keller, in the petitioner's trial.

During the petitioner's trial, Judge Boyer appeared in the courtroom, together with Judge Keller, when the case was called for trial on the mornings of June 7, 8, 9, 10, 11, 12 and 14, 1948, as well as at all afternoon sessions, (Rel. Ex. 115(c); R. 1117a-1119a). That Judge Boyer appeared on the bench at the beginning of all morning and afternoon sessions of Darcy's trial was not contradicted but was corroborated by the respondents' witnesses, (R. 312a, R. 362a, R. 379a). Moreover, it was corroborated by the Criminal Court records.

In addition to sitting on the bench with Judge Keller at the beginning of each session, Judge Boyer, at petitioner's

trial, appeared at different times as a spectator in the court room.

Judge Boyer sat in a chair on the front row of the chairs in the front of the court room in the section reserved for attorneys, *directly facing and about twenty-three feet away from the jury*, where he could be plainly seen and observed by the jury, (R. 479a, R. 486a, R. 488a, R. 509a, R. 515a-517a, R. 535a, R. 541a, R. 542a-545a, R. 556a, R. 592a-593a, R. 613a, R. 617a, R. 628a, R. 727a-728a, R. 731a-733a, R. 739a, R. 875a-876a, R. 911a; Rel. Exs. 118, 119 and 135; R. 1120a, R. 1121a and R. 1131a). This fact is not contradicted by the respondents' evidence. So great was Judge Boyer's interest in the outcome of this case that he sat as a spectator in the court room in the section reserved for attorneys during the evening session held on Friday, June 11, 1948, for the entire session, which lasted about two to two and one-half hours, (R. 487a-489a).

Further, during the Darcy trial, not only did Judge Boyer sit on the bench with Judge Keller at the beginning of each session, but on certain occasions he remained throughout the session, and on other occasions he left and then returned to the bench. On the occasions he sat on the bench with Judge Keller, he assisted and conferred with him in the conduct of the trial of the petitioner and participated in various rulings, particularly regarding the admissibility of evidence (R. 488a, R. 499a-501a, R. 540a-542a, R. 592a, R. 605a, R. 612a, R. 619a-622a, R. 625a, R. 781a, R. 875a-876a, R. 906a-907a).

It is also uncontradicted that at the session held on Saturday, June 12, 1948, Judge Boyer actively participated in the ruling of admissibility of a joint confession made by all the defendants. *This question admittedly involved a difficult evidentiary problem.* As a result of the ruling, the jury was permitted to take into consideration parts of the written statements of the defendants wherein Darcy

admitted participation in other holdups. When Mr. Achey, the petitioner's counsel, objected to the offer, Judge Boyer imposed: "That applies only to cross-examination", (Rel. Ex. 5E; R. 1144a-1146a). Although Mr. Achey objected to Judge Boyer's participation and although Judge Boyer thereafter withdrew from the bench, the fact and effect of Judge Boyer's participation in the foregoing ruling was observable by both the spectators and jurors, (R. 479a, R. 535a, R. 541a, R. 612a, R. 781a-782a, R. 784a, R. 884a, R. 909a-910a). The impact of Judge Boyer's participation on the jury was necessarily great, because soon after this ruling the Commonwealth closed its case and the defense offered no evidence.

To climax Judge Boyer's extraordinary interest and participation in petitioner's case were the events of Monday, June 14, 1948. During Judge Keller's charge to the jury, Judge Boyer was seated in the section of the court room reserved for attorneys. Next to him was seated District Attorney Biester. Both Judge Boyer and Mr. Biester were seated so that they were plainly observable by the jurors, (R. 481a, R. 517a, R. 542a-544a, R. 546a-548a, R. 612a-613a, R. 628a-629a).

Towards the close of the Court's Charge, Judge Keller inquired of counsel for the Commonwealth and for the defense whether the Court had overlooked anything and whether there were any corrections to be made, (Rel. Ex. 5E; R. 1146a-1150a). Mr. Achey, defense counsel, answered that he had nothing to add, (R. 1148a). The Court thereupon resumed its Charge. At this point, Judge Boyer, who was seated next to District Attorney Biester, handed the latter a note. Mr. Biester read the note, then arose from his chair and approached the bench where Judge Keller was concluding his Charge. Mr. Biester succeeded in attracting Judge Keller's attention and stated:

"I may have misunderstood part of your Charge, but I thought that you said that if the shooting of Kelly was unintentional, that would be murder of the second degree; that if it were during the flight from the crime it would be murder in the first degree" (R. 1149a).

Judge Boyer's participation and assistance in the District Attorney's correction of Judge Keller's instruction to the jury was observable by both the spectators and jurors in the court room, (R. 481a-487a, R. 505a-506a, R. 516a-523a, R. 542a-544a, R. 548a-554a, R. 556a, R. 612a-616a, R. 626a-629a).

The attendance and participation of Judge Boyer at petitioner's trial, both when he sat on the bench with Judge Keller and also on the occasions when he sat in the section reserved for attorneys (especially on the Friday evening session of June 11, and the Monday, June 14 session) was observable by both the spectators and jurors in the court room and was a constant reminder to them of the Foster-Zeitz trial and Judge Boyer's praise to the Foster-Zeitz jury for their services in having rendered verdicts of guilty with death penalties. Judge Boyer's attendance and active participation was not affirmatively contradicted by the respondents.

J.

Respondents' Evidence.

The respondents' evidence, which was, in effect, adopted by the District Court and the court below, did not attempt to contradict these facts: (1) that there was newspaper publicity and editorials concerning the Feasterville Tavern

holdup, as shown by the petitioner herein; (2) that there were public expressions of indignation as testified to by the seven witnesses called by the petitioner; (3) that there was widespread newspaper publicity and radio broadcasts of the Foster-Zeitz trial; (4) that Judge Boyer, both before, during and after the petitioner's trial displayed his personal feelings against these defendants; (5) that petitioner's trial was originally scheduled to start at the term following the Foster-Zeitz trial and was only rescheduled to commence immediately thereafter during the last days of the first trial; (6) that, according to the Criminal Court records, the jury panel from which the petitioner's jury was drawn, appeared in the court house during the Foster-Zeitz trial and had the opportunity to attend and listen to it; (7) that the voir dire examination in petitioner's trial showed a marked increase in fixed opinions of the jury, so that almost *one out of every three jurors* asked the question admitted he had a fixed opinion in the case; (8) that Judge Boyer did sit both on the bench and in the courtroom almost daily throughout petitioner's trial and did participate in at least one ruling on the most vital question in the case.

The respondents' evidence did not counter-act the cumulative effect of all the foregoing factors on the trial of the petitioner—the effect being of such a nature that his guilt and the death penalty which he eventually received were both prejudged by the jury.

In short, the respondents' evidence, that is the certificate of Judge Keller, (Resp. Ex. 5; R. 1133a-1140a), and the testimony of District Attorney Biester, Assistant District Attorney Curtin, the various tipstaves, state troopers, Doylestown police and jail wardens was designed to establish only two factors: (1) the decorum of the petitioner's trial itself and (2) the segregation of the petitioner's jury.

6.

ARGUMENT.

I.

Summary of argument.

1. This case presents the following issues: (a) whether the petitioner in a habeas corpus case had not been denied due process of law under the Fourteenth Amendment merely because there was no proof that the physical presence of a mob or a threat of mob violence had dominated his trial on a capital charge in a state court, and (b) whether such petitioner had been denied due process of the law by having been compelled to have his case tried before both a trial judge and a jury and also before an "overseer judge" who had shown such a * * * "striking manifestation of extraordinary interest in the proceedings", (R. 1250), as to make his attendance, participation and conduct in the petitioner's trial "extraordinary and unprecedented", (R. 1264).

2. All seven (7) of the judges in the court below were of the opinion, as stated by the majority, that: "The situation certainly would have justified a decision to wait awhile before trying the relator, or else to try him in another community if trial immediately after the conviction of his confederates was deemed important. We may be persuaded that in the circumstances it would have been wise to take such precautions, * * *", (R. 1248).

The judges were divided (4-3) as to whether the failure to follow the "*wiser course*" was a denial of the essence of fair trial.

3. There was uncontradicted evidence at the hearing before the District Court that the trial was dominated by a more subtle, and even a more direct, type of trial domination than a physical presence of a mob or a threat of mob violence. There was evidence that: (a) the local newspapers, by their inflammatory and prejudicial articles and editorials carried on a campaign to secure the death penalty for petitioner, irrespective of the evidence and extenuating circumstances, (b) that such newspaper campaign influenced and guided public opinion to such a degree that by the date of the petitioner's trial the death penalty eventually imposed had already been prejudged, (c) that the petitioner's trial, originally scheduled to start at the term of court following the trial of his companions, was suddenly rescheduled to start immediately thereafter when it was apparent that death penalties would be imposed in that trial, and *did begin on the first court day* after his companions' trial had been completed, (d) that the jury panel selected to try petitioner had been present in the court house during the trial of his companions, (e) that 89% of the jurors asked the question had answered that they had read the newspaper accounts of the prior trial, 50% of those asked answered that they had discussed the case, and 30% of those asked answered that they had fixed opinions about the case, and (f) that petitioner was tried by a "two-judge" bench, consisting of the trial judge and the judge, who had just three days before completed presiding in the trial of his companions, and had publicly praised the jury's fixing their penalty at death as the only possible penalty, who acted as an "overseer judge" and as an aid to the prosecutor in petitioner's trial, who was known by the jurors to be "hostile" to petitioner, and whose attendance and active participation influenced and guided the jury's imposition of the death penalty.

The failure of the trial court sua sponte to change venue

or to continue the trial constituted a denial of due process. *Shepherd vs. Florida*, 341 U. S. 50, (1951) and *Moore vs. Dempsey*, 261 U. S. 86, (1923).

4. Three of the seven judges in the court below, recognized Judge Boyer's "rather striking manifestation of extraordinary interest in the proceedings" as constituting such a fundamental impropriety in a state trial, which should be corrected by a Federal Court under the due process clause of the Fourteenth Amendment.

The trial before *two judges* and a jury does not constitute due process of law, especially where the judge, other than the trial judge, has publicly evinced bias and prejudice against the accused and his companions and has assumed the role of a judge and prosecutor in his desire to assure the accused's receiving the death penalty. It would be very strange if our system of law permitted a judge, whether the trial judge or an "*overseer judge*", to act as a prosecutor and then try the very person accused as a result of his investigation.

Judge Boyer, by his public declaration of satisfaction with the death penalty imposed by the jury in the Foster-Zeitz case, became a "*prosecuting judge*" in the Darey trial. Having made public his antagonism towards "outlanders", and towards the petitioner and his companions in particular, Judge Boyer could not be, in the very nature of things, wholly disinterested in the conviction or acquittal of the petitioner or in the penalty he was to receive, whether death or life imprisonment.

As stated in *In the Matter of Murchison*, 349 U. S. 133, (137), (1955):

> "* * * Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer * * *."

5. A fair trial in a *fair tribunal* is a basic requirement of due process. Fairness, of course, requires an absence of actual bias in the trial of cases. Our system of law has always endeavored to prevent even the possibility of unfairness. This Court has said that: "Every procedure which would offer a possible temptation to the average man as a judge * * * not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law": *Tumey vs. State of Ohio*, 273 U. S. 510, (532).

Where a judge, other than a trial judge, so actively participates in the trial of a case, as did Judge Boyer in the instant case, and where such judge is "known" by the trial jury to be antagonistic to the accused on trial to such an extent that all seven (7) members of the Court of Appeals recognize his "rather striking manifestation of extraordinary interest in the proceedings", as a "dubious occurrence" in state procedure, then there cannot be the slightest doubt that such "*overseer judge*" has deprived the accused of a right under the Constitution. It is a right of the accused to be tried by a *legally constituted court*, not by a kangaroo court or a court which is intent upon his receiving the death penalty. A legally constituted court consists of but one trial judge, and not of a trial judge and an "overseer judge".

6. Certainly the proceedings in petitioner's trial—, in and out of the court room, both before and during the trial—, established that he did not receive a fair trial. The conviction in the instant case was clearly brought about by methods that offend "a sense of justice". Not only was Darcy tried in an atmosphere of prejudice and hysteria engendered by inflammatory newspaper articles that reached their climax during the two weeks of the Foster-Zeitz trial and evidenced by uncontradicted expressions of

public opinion against Darcy, but he was also tried before a "*two-judge*" bench, by a District Attorney and one member of such bench.

The petitioner's trial and conviction under such circumstances necessarily "shocks the conscience", offends "a sense of justice" and runs counter to "decencies and civilized conduct" as well as to "the community's sense of fair play and decency". Not only was Darcy prejudged guilty before his trial, but his conviction and the imposition of the death penalty were guaranteed by Judge Boyer's "extraordinary interest" in his trial and Judge Boyer's active participation therein and constituted a denial of due process.

II.

The failure of the State Court in a capital case sua sponte to change the venue or to continue petitioner's trial, where the case had been prejudged by the citizens of the county due to local newspaper campaign designed to secure death penalty and where the trial was suddenly scheduled to start after end of companions' trial imposing death penalties, violated the due process clause of the Fourteenth Amendment.

A.

The Public Prejudice and Passion, Engendered by Out-of-Court Newspaper Campaign, Dictated the Imposition of the Death Penalty by the Jury Just as Effectively and Forcefully as the Physical Presence of a Mob or the Threat of Mob Violence.

The rights here violated are of the kind which this Court has always been diligent to protect. Whether federal guar-

antees of the sort here involved have been violated is a question which this Court has consistently determined itself by independent examination of the record: *Cassell vs. Texas*, 339 U. S. 282 (1950); *Haley vs. Ohio*, 332 U. S. 596 (1948); *Malinski vs. New York*, 324 U. S. 401 (1945).

The Fourteenth Amendment prohibits the conviction "* * * of one whose trial is offensive to the common and fundamental ideas of fairness and right": *Betts vs. Brady*, 316 U. S. 455 (1942); *Buchalter vs. New York*, 319 U. S. 427, 429 (1943); *Rochin vs. California*, 342 U. S. 165, 169 (1952).

As stated by Biggs, Chief Judge, in his dissenting opinion:

> "* * * The judicial process under which Darcy was tried was so distorted by circumstances, both in and out of the courtroom, as to result in fundamental unfairness. * * * By editorials, news stories and comments, the press prejudged Darcy's case and prejudiced the minds of the citizenry against him. I cannot believe that all members of the jury remained uninfluenced by these publications", (R. 1265-1266).

The majority opinion in the Court below, relative to petitioner's claim that he was tried in an atmosphere of prejudice and hysteria, clearly shows that the majority had *mental reservations* in their holding that the petitioner's trial at the time and place in question was not a denial of due process.

The following factual findings, which the majority made on the score of the circumstances prior to and during the trial itself, (aside from Judge Boyer's presence in the court room and participation during Darcy's trial), would have substantiated a conclusion that petitioner's trial at the time and place in question was a denial of due process under the Fourteenth Amendment:

> "* * * (Relator has relied upon) the daily newspaper accounts and editorial comments published in the

community during the trial of two of relator's alleged confederates, which ended only three days before he himself was required to stand trial."

"The evidence * * * indicates that during the two weeks immediately preceding relator's trial, the community in general had experienced a revival and quickening of interest in the homicide attended by many expressions of indignation against its perpetrators."

"* * * The evidence makes it very probable that they (the jurors) also knew that he (Judge Boyer) had just completed the trial at which relator's co-defendants had been convicted and sentenced to death."

"* * * But another judge of the same Court, Hon. Calvin Boyer, was much in and about the courtroom during the course of this trial. Judge Boyer had just completed a trial at which relator's confederates had been convicted of first degree murder without recommendation of mercy and, according to the press, he had commended the jury for its verdict."

"* * * The situation certainly would have justified a decision to wait a while before trying the relator, or else to try him in another community, if trial immediately after the conviction of his confederates was deemed important. We may be persuaded that in the circumstances it would have been wise to take such precautions * * *", (R. 1245-1248).

Despite these significant and critical findings and despite the uncontradicted evidence as to the increased fixity of opinion as to Darcy's guilt as evidenced by the voir dire examination, the majority of the Court below concluded that it was not convinced "* * * that failure to follow the 'wiser course' was a denial of the essence of fair trial", (R. 1248).

The majority's conclusion that petitioner was not tried in a community, so aroused against him that a fair trial was

impossible, was based upon the misapplication of two legal principles: (1) that *Frank vs. Mangum*, 237 U. S. 309 (1915); *Moore vs. Dempsey*, 261 U. S. 86 (1923); and *Powell vs. Alabama*, 287 U. S. 45 (1932), warrant a conclusion that one was tried in a community so aroused against him that a fair trial was impossible *only* where there is proof that physical presence of a mob or a threat of mob violence has dominated a criminal trial; and (2) that the fact that petitioner was afforded the right of voir dire examination necessarily nullified his claim that he was tried in an atmosphere of prejudice and hysteria.

The rationale of *Moore vs. Dempsey*, 261 U. S. 86, which requires that a defendant be afforded a trial free from mob domination and from passion and prejudice, can usually be satisfied in only one of two ways, should such an atmosphere exist where and when the trial is scheduled,—by a change of either the time or the place of trial.

When the record discloses that local newspapers printed inflammatory stories and articles between the date of the crime and the date of his companions' trial; that for two weeks during the trial of his companions, the newspapers printed inflammatory accounts thereof; that the trial judge in the first case publicly praised the jury for having imposed the death penalties; that the public prejudice and passion were rekindled and intensified by the news accounts of the first trial; *then* passion and prejudice have reached a stage, from which they should be permitted to subside by the passage of time, before holding a trial for the crime which precipitated the newspaper campaign and passion and prejudice in the area in which they occurred.

In *Shepherd vs. Florida*, 341 U. S. 50, the respondents attempted to establish that the violence and attendant passion were isolated from the trial by space and time. They asserted that all the violence occurred far from the court house, and that by the time of the arraignment, on August

12, the whole of the county was so quiet and peaceable that the petitioners remained there until the trial on September 1 "without the slightest untoward incident being revealed by the record."

This Court, in the *Shepherd* case, in effect, found that this prejudicial atmosphere—engendered by inflammatory newspaper publicity that reached into every corner of the county—had not subsided by the time of trial. *The fact that defendants could be safely imprisoned within the county was but the slightest evidence of a healthy attitude* —contradicted by the Court's special order compelling the search of persons and property entering the courtroom, and continuous newspaper publicity.

Likewise, in the instant case, the mere fact that the trial was conducted with *dignity and decorum*, without any hostile congregation or demonstration, without the court room having been crowded and with the precautions having been taken for keeping the jury under strict guard—*does not necessarily warrant a conclusion that the trial was not held in an atmosphere of prejudice and hysteria.*

This Court has recognized that violence is not so easily replaced by calm. In *Milk Wagon Drivers Union vs. Meadow Moor Dairies, Inc.*, 312 U. S. 287, (1941), the Court stated:

> "* * * In such a setting it could justifiably be concluded that the momentum of fear generated by past violence would survive even though future picketing might be wholly peaceful * * *", (p. 294).

The inflammatory and prejudicial articles and editorials of expressions of public passion and prejudice against Darcy and the increase in fixity of opinion permeated the petitioner's trial and contaminated it as much as if there had been evidence of the physical presence of a mob or a threat of mob violence.

(a)

Newspaper reporting was not factual and editorials were not fair comment.

An examination of the newspaper articles and editorials shows that the newspapers' reporting of the crime and of the Foster-Zeitz trial was not factual and that the editorials were not fair comment, (R. 953a-1116a, R. 1123a-1130a).

A. Russell Thomas, reporter for the Daily Intelligencer, when questioned relative to the statement in the article in the December 26, 1947, issue, (Rel. Exs. 16-17; R. 964a-966a)—that "the general feeling of the public—in Bucks County at least—appears to be that no time should be spared in bringing the bandits to trial, and that it is a 'break' for society at large to have the trial in Bucks County rather than in Philadelphia", testified that the report had been "editorialized" by the front office, (R. 428a).

The newspaper articles show an attempt to dramatize the crime and the trial, obviously to prejudice the readers against these youths. The characterization of the four defendants as "bandits", "thugs", "holdup men", "all Philadelphians", "gunmen" time and time again in the newspaper article does not reflect factual reporting. The reference to Kelly as "a popular citizen", (Rel. Ex. 21; R. 972a), and as a "highly respected citizen", (Rel. Ex. 63; R. 1032a), was not factual reporting but obviously an attempt to prejudice the readers against these defendants. The statement that the defendants "morally killed three men", (Rel. Ex. 72; R. 1055a), is not factual reporting, but was obviously an attempt to prejudice the readers. The reference to the defendants' "sensational 30 day crime spree * * * during which seven persons (were) shot (and) (1) murdered and 9 places held up by 4", (Rel. Exs. 72 and 73; R. 1056a,

R. 1059a), is not factual, but an attempt to prejudice the readers. The reference to the defendants as "callous" and "gangsters" and "gun toters", (Rel. Ex. 20; R. 970a), is at most overdramatized reporting and effective propaganda.

The following dramatic descriptive words are found in the newspaper accounts of the crime and trials: "quartet of armed bandits", "shot three men", (Rel. Ex. 12; R. 953a); use of the word, "bandits", 15 times and the word, "thugs", 5 times in one article, (Rel. Ex. 13; R. 955a-958a); "all Philadelphians", (Rel. Ex. 14; R. 959a); "gunmen", "holdups", "shoot it out", "bandits", (Rel. Exs. 14-15; R. 959a-963a); "four way murder case", "young Philadelphians", "bandits", (Rel. Exs. 16-17; R. 964a-966a); "bandits", "Philadelphians", "wild chase", "shot their way out", (Rel. Exs. 18-19; R. 967a-969a); "potential killers", "callous shooting", "trigger happy bandits", etc., (Rel. Ex. 20; R. 970a); "thugs", "trigger-happy bandits", (Rel. Ex. 21; R. 972a); "hard-boiled", "wise cracking", etc., (Rel. Ex. 65; R. 1038a); "morally killed three men", "callousness", "outrageous", "escapade", "sensational 30 day crime spree", (Rel. Exs. 72-73; R. 1055a-1056a); "bravado", "killers", "Philadelphians", (Rel. Ex. 78; R. 1068a).

The foregoing are only a few examples of the non-factual and overdramatic descriptive words used by the newspaper in reporting the crime in the Foster-Zeitz trial.

Further, the headlines carried on the front page of the newspapers were not factual, but clearly intended to dramatize the crime and the trial and to impress the readers with the criminal activities of the defendants. The headline relative to juror Westlake having thrown a "bomb shell" into the court, during his voir dire examination, necessarily impressed the readers with his feeling that he considered this as the "coldest-blooded murder" that he ever read about. (Rel. Ex. 62; R. 1080a).

Likewise the editorials showed the newspaper policy de-

signed to secure the death penalty for these defendants, (Rel. Exs. 20, 22, 31, 42, 48, 49, 84, 90, 105; R. 970a, R. 974a, R. 982a, R. 998a, R. 1003a, R. 1005a, R. 1086a, R. 1093a, R. 1103a).

An examination of the editorials discloses that the newspapers criticized the leniency exercised by jurors and even condoned *mob law*. None of the editorials even leaves to the juror's discretion the determination of the guilt or innocence of a defendant or the penalty to be fixed.

The following entitled editorials demand convictions and the stiffest penalties, irrespective of the evidence and the applicable law in each case:

"FAST POLICE WORK", (R. 970a-971a);
"ERRORS OF JURORS", (R. 974a-975a);
"WHO'LL BE THE NEXT?" (R. 982a-983a);
"TIME FOR AN EXAMPLE", (R. 998a);
"JURORS REBUKED AGAIN", (R. 1005a-1006a);
"VERDICTS HIGHLY PRAISED", (R. 1093a); and
"RAUS MIT 'EM", (R. 1103a-1104a).

Newspaper accounts and editorials relative to the crime and trials were carried in the Philadelphia newspapers, as well as in the local Bucks County newspapers. These newspapers had large circulations and reached practically every adult in Bucks County.

Radio stations WBUS at Doylestown and WBUX at Quakertown had their reporters covering the murder trials at the Doylestown Court House and reporting the news thereof at each noon and evening broadcast, (R. 1126a-1128a).

The prosecution of the petitioner and his companions was characterized by "Bucks County Justice" as expressed by the newspaper articles and editorials in the various issues of the newspapers and the testimony of witnesses, (R. 318a,

R. 965a, R. 1099a, R. 1102a, R. 1103a). These articles and editorials show a designed plan to secure the death penalty for the petitioner irrespective of the particular facts of his case.

The Intelligencer issue of December 26, 1947, states:

> "*Feeling Runs High.*
>
> The general feeling of the public—in Bucks county at least—appears to be that no time should be spared in bringing the youthful bandits to trial, and that it is a 'break' for society at large to have the trials in Bucks County rather than in Philadelphia", (Rel. Exs. 16 and 17; R. 965a-966a).

The editorial entitled, "ERRORS OF JURORS", in the December 31, 1947, issue, (Rel. Ex. 22; R. 974a-975a), criticized the inefficiency of jurors and demanded that jurors be "courageous and conscientious in the performance of their duties". The Intelligencer issue of January 16, 1948, in the column, "The Gossiper", (Rel. Ex. 25; R. 979a), demanded that if "* * * courts and jurors were to dispense with a lot of the sentimentality about criminals * * * the general public would not face so many horrible crimes as horrify newspaper readers daily." The Intelligencer issue of February 2, 1948, (Rel. Ex. 31; R. 982a-983a), contained an editorial headed, "WHO'LL BE THE NEXT", plainly condoned mob law in its statement that "It would be lamentable if citizens were forced to take the punishment of them into their own hands". An editorial in the Intelligencer issue of February 18, 1948, (Rel. Ex. 42; R. 998a), headed, "TIME FOR AN EXAMPLE", demanded that example be made of Philadelphia's young criminals who made criminal fofays into Bucks County.

Further proof that the newspaper reports of the crime and the Foster-Zeitz trial were not true and accurate but

were inflammatory and prejudicial is seen in the Intelligencer issue of Thursday, June 3, 1948, (Rel. Exs. 72-73; R. 1056a-1061a). There, in a frontpage article headed "Defense in Murder Trial Decides Not to Offer Evidence," it is stated that:

> "Seven persons were shot, one was murdered and nine places were held up by the four accused Philadelphians, according to the statements submitted in evidence in court yesterday, and signed by Zeitz, Foster, Darcy and Capone", (R. 1059a).

This article is incorrect inasmuch as it is uncontradicted that *Darcy did not participate and was not involved in four of such holdups*. The confessions admitted in evidence in the Foster-Zeitz trial clearly show that Darcy was not a participant. Only three of the seven confessions were received at the petitioner's trial and upon objection by defense counsel that part pertaining to one holdup, in which the petitioner was not involved, was excluded with cautionary instructions. (Opinion Denying Petition, Footnotes 15 and 16; R. 1203a and R. 1204a).

This example of incorrect newspaper reporting recalls a similar occurrence in *Shepherd v. Florida*, supra. There newspaper men testified that the sheriff told them that petitioners had confessed and that they published this fact in their newspapers. The alleged confessions were not introduced in evidence, but, as here, news of the alleged confessions was widely published. This Court sharply criticized such unrepudiated newspaper reporting.

In the instant case, 89% of the jurors examined and asked the question testified that they had read of the case in the newspapers, (Brief, p. 36). Certainly, there is nothing in the record to show that the grossly false statement in said article had ever been corrected.

The atmosphere of prejudice and hysteria demanding execution of the death penalty for the petitioner existing at the time of his trial continues even up to the time of the argument before the Court of Appeals, as evidenced by the recent newspaper articles in the Philadelphia newspapers. These articles, even though published at a later date, are corroboration of such prejudice, according to Mr. Justice Holmes' opinion, in *Moore v. Dempsey*, 261 U. S. 86 (90):

> "The averments as to the prejudice by which the trial was environed have some corroboration in appeals to the Governor, about a year later, earnestly urging him not to interfere with the execution of the petitioners."

(b)

There Was Widespread Public Sentiment Against Petitioner.

It is further uncontradicted that the foregoing newspaper campaign resulted in widespread antagonism against Darcy in Bucks County: Public opinion against these defendants grew in such intensity from the date of the holdup that it amounted to an atmosphere of hysteria and prejudice, reaching its climax at the Darcy trial.

Reverend Frank J. Damrosh, of St. Paul's Episcopal Church, Doylestown, testified that the general feeling towards Darcy and the other defendants, within a ten-mile radius of Feasterville, was "that they were all guilty" and that *"no other case in 18 years in Bucks County that aroused the state of feeling"*. (R. 130a-131a). *Reverend William Babinsky*, of the Dutch Reformed Church of America, Feasterville, testified that, within a radius of Feasterville, he had heard such remarks as that "the boys don't need a trial", "should be condemned to death", "should have no

mercy", "ought to be hanged", "ought to be shot", "stamped out like bugs", "there should be no mercy", "they ought to get the chair", (R.160a-166a). *Coe Farrier*, an attorney, testified that en route on the commuter's train to Philadelphia, and within the radius of Feasterville, Langhorne and Southampton, he heard such expressions against defendants from Bucks Countians: "these kids should burn", "the only thing should happen to them was they should burn", (R. 187a); "are you keeping those murderers out", "when are they going to burn", "how long do you think you can keep them away from the hot spot", "I think they all should burn", (R. 188a); "these fellows ought to burn", (R. 202a); and "they wanted an eye for an eye, a tooth for a tooth", (R. 206a). *Dr. Carl J. Hoffman* testified that within an area of Richboro, Newtown and Feasterville, he heard such expressions against defendants as "they ought to be hanged", "get the chair", or "why bother with them", (R. 257a); "the idea of boys in Philadelphia coming into Bucks County", consider them "as gangsters and undesirable elements", (R. 258a); "the boys were gangsters * * * they should have stayed in Philadelphia", (R. 259a); "there should be no mercy" and "we should throw them out", (R. 260a); "they should be hung", (R. 267a). *Mr. Howard Price* testified that, within an area surrounding Bristol and Sellersville, he heard such expressions as "the boys were from out of town * * * from Philadelphia. They should be given *Bucks County justice*", "lynch", "hang" and "shot", (R. 317a-319a). *Mr. Knickerbocker Davis*, who made an independent survey in the area surrounding Doylestown and as far north as New Hope, testified that he heard such expressions as "hope they get the hot seat", "* * * see them taken out and shot * * *", "* * * like to see them strung up * * *", (R. 436a-437a). *Mrs. Inez Darcy Heckman*, Darcy's sister, testified that, within the area of Doylestown Borough, she had heard such expressions as the defendants "don't

deserve a trial", (R. 587a), and that "well, he doesn't stand a chance here", and "well, he is going to get it too", referring to the imminent trial of her brother, (R. 589a). *Miss Alice Patterson*, Zeitz's aunt, testified that during his trial, she heard the following expression at the Doylestown Inn: "they haven't got a chance in Doylestown because they hated Philadelphia boys, and they were very bitter", (R. 394a).

The foregoing expressions of public sentiment and indignation against these defendants, and particularly against the petitioner, *were not contradicted* by the respondents. Not one of the witnesses called by the respondents testified that he had *not heard such expressions* condemning and castigating the defendants.

At most, *the certificate of Judge Keller*, (Resp. Ex. 5; (R. 1133a), and the testimony of the District Attorney and his Assistant, as well as the testimony of the tipstaves, the state trooper and other police officers, constituted merely general statements denying the existence of an atmosphere of prejudice and hysteria. This the District Court summarized as being to the effect that "there were no outbursts, no disturbances, no untoward incidents either in or outside the court room, in Doylestown, or elsewhere throughout the county," (R. 1212a-1213a).

The District Court indicated that in order for the petitioner to prove that there was a public sentiment amounting to an atmosphere of hysteria and prejudice against him, the petitioner was under a duty to bring into court all citizens who were adults in 1948 and to have them affirmatively testify in support of his contention. Such a burden could never have been met by the petitioner. It must also be remembered that it was necessarily very difficult for the petitioner at this later date to secure Bucks Countians, who would testify that they themselves had advocated lynching, or mob law, or that they had demanded that the youths involved in the holdup receive the death penalty, irrespective of the evidence and law in each case.

Darcy's trial commenced on June 7, 1948, in spite of the passion and prejudice that had been aroused by the tremendous amount of newspaper articles and editorials of an inflammatory character, that reached a climax during the Foster-Zeitz trial.

B.

Darcy's Trial Was Rendered Unfair and the Severance Theretofore Granted Made Worthless by Being Suddenly Advanced to Start after End of Companions' Trial and after Trial Judge Therein Had Publicly Praised Jury for its Imposition of Death Penalties.

Darcy had been granted a separate trial pursuant to the Pennsylvania Act of March 31, 1860, P. L. 427, 19 Purdon's Penna. Statutes Annotated, Section 785.

The rationale for such severance was that he should be fairly tried in a public tribunal free of "prejudice, passion, hysteria and tyrannical power".

The finding of the majority of the Court of Appeals that "the situation certainly would have justified a decision to wait a while before trying the relator or else to try him in another community * * *", (R. 1248), is most significant. The majority thereby recognizes that the severance theretofore granted Darcy was rendered worthless, when his trial was proceeded with only three days after that of Foster and Zeitz.

As stated by Biggs, Chief Judge, in his dissent:

> "Under the circumstances a change of venue or a delay in putting Darcy on trial was requisite to fairness", (R. 1266).

The only reason that can be attributed for the sudden rescheduling of the Darcy trial is that the Bucks County

Court, during the Foster-Zeitz trial, came to the conclusion that public prejudice against all defendants was such that death penalties could be secured. The overwhelming weight of evidence is that Darcy's case was originally scheduled for the term following the Foster-Zeitz trial, and then was suddenly advanced to follow immediately thereafter.

The newspaper reports of the prospective dates of the respective trials were never repudiated by the District attorney's office. All newspaper reports prior to June 4, 1948, are consistent in stating that the cases of petitioner and Capone would be tried at a later term of court, (Rel. Ex. 51; R. 1007a; Rel. Ex. 55; R. 1009a; Rel. Ex. 64; R. 1034a; Rel. Ex. 65; R. 1038a; Rel. Ex. 70; R. 1049a).

It is most significant that the *first date* the newspapers reported that the Darcy trial was to start, immediately after the close of the Foster-Zeitz trial, was in the Intelligencer issue of Friday, June 4, 1948, (Rel. Ex. 76; R. 1066a). It is only natural to infer that the only reason for the change in plans was that the District Attorney's office on Friday, June 4, 1948, was convinced that it had the Bucks Countians in a convicting and "electric chair" frame of mind, and that it would be expedient to dispose of the Darcy case at once, before the atmosphere of hysteria and prejudice and public indignation died.

Another reason for the sudden rescheduling of petitioner's trial is that the District Attorney's office knew that the jury panel, from which petitioner's jury was to be selected, had been present in the court house during the Foster-Zeitz trial and, therefore, had the opportunity to listen to or hear of the details of the Feasterville holdup. The Bucks County Criminal Court records clearly show that on June 1, 1948, the traverse jurors summoned to appear on that date: "All answered to their names but the following * * *", (R. 952a), and then there are listed the names of 40 jurors who did not then answer for service, (Rel. Ex. 10 (c) and (d); R. 948a-

952a). It is admitted that talesman Slaughter was present during several sessions of the Foster-Zeitz trial. (R. 1143a-1144a).

The analysis of the voir dire examination of the jurors who served in petitioner's case and were asked the questions shows that 89% of those asked admitted that they had read pertinent newspaper articles, 50% of those asked admitted that they had discussed the case, and 30% of those asked, or *one out of every three*, admitted that they had fixed opinions and were excused by the trial judge because they had formed opinions which they could not change. (Brief p. 36). This analysis shows an increase of 26% over the number of jurors in the Foster-Zeitz case, who had been asked whether they had read pertinent newspaper articles and admitted that they had, a 10% increase over the number of Foster-Zeitz jurors, who had been asked whether they had fixed opinions and admitted that they had.

This case falls within the evils of public prejudice and hysteria discussed in *Commonwealth v. Karmendi*, 328 Pa. 321, (339). There, of the 39 prospective jurors on the regular panel, 11 were excused because they had formed opinions which they could not change. Of 41 talesmen who were examined before the jury was completed, 13 were excused for the same reason. Approximately one-third of the jurors called to try the defendant stood up in open court and said they had fixed opinions derived from reading the newspapers and hearing the case discussed which they could not and would not change.

Justice Drew, commenting thereon, stated at page 339:

> "The examination of the testimony taken on voir dire *reveals a remarkable fixity of opinion; the crystallization of public sentiment is apparent*". (Italics supplied).

In view of the pressure to try the Darcy case immediately after the Foster-Zeitz case had closed with the electric chair penalty, and while the newspaper and radio publicity and public indignation were still fresh in the minds of Bucks Countians, there could be no question but that the verdict in the petitioner's case was a foregone conclusion and that he was already prejudged. All the circumstances leave but one inference: that is, when petitioner's trial started on Monday, June 7, the prevailing opinion in Bucks County was that "Darcy is guilty and he must receive the electric chair."

The conclusion of the majority of the Court of Appeals condemns petitioner for his trial counsel's failure to move for change of venue or continuance, although in its previous per curiam opinion, (203 F. 2d 407, 409), it had sustained the action of the District Court in denying the petition for habeas corpus, based on the objection, that Darcy was deprived of due process by reason of the lack of effective assistance of counsel.

Neither of the decisions cited by the Court of Appeals, as authority for its position that significance must be attached to the fact that at no time did petitioner ask for a change of venue, is applicable: *Stroble v. California*, 343 U. S. 181, (1952); *United States v. Rosenberg* (C. A. 2), 200 F. 2d 666, (1952).

First, the petitioner was not permitted to explain that he himself had not waived the right to ask for a change of venue, or for a continuance because the Court of Appeals in its earlier decision, (203 F. 2d 407, 409), had excluded any testimony showing the lack of effective assistance of counsel. Secondly, in the *Stroble* case more than two (2) months elapsed between the alleged inflammatory newspaper articles and the date of the trial, and in the *Rosenberg* case there were no news items whatsoever concerning the pending prosecution between November, 1950, and

February 21, 1951, the date of the trial,—a period of three (3) months.

In any event, as stated in the *Stroble* case, (at 193-194), "*petitioner's failure to make such a motion was not dispositive of the issue here.*"

In the Darcy case, the trial started only two (2) days after two (2) weeks continuous publication of inflammatory newspaper articles about the Foster-Zeitz trial, wherein Darcy's name was daily mentioned. The publication of the news of the Foster-Zeitz trial for two (2) weeks immediately preceding Darcy's trial prejudiced the jury in arriving at their verdict.

The newspaper accounts of his companions' trial rekindled public prejudice in his case and aroused to an even higher degree such prejudice in the community that petitioner's trial was "fatally infected" with an absence of "that fundamental fairness essential to the very concept of justice." *Lisenba v. California*, 314 U. S. 219, 236; (1941).

Nevertheless, the majority of the Court of Appeals have concluded that: "The situation certainly would have justified a decision to wait a while before trying the relator, or else to try him in another community if trial immediately after the conviction of his confederates was deemed important. We may be persuaded that in the circumstances *it would have been wise to take such precautions*, * * *", (R. 1248). (Italics Supplied.) In its opinion, the majority further commented as to petitioner's original counsel: "And he did not at any time ask for a change of venue", (R. 1247).

The Court of Appeals' findings and conclusions, relative to the issue of effective assistance of counsel, are, to say the least, contradictory and inconsistent.

In its earlier opinion, the Court of Appeals excluded any proof in support of the petitioner's contention as to lack of effective assistance of counsel. Now, in attempting to justify their conclusion that petitioner received a fair and

impartial trial, the majority of the Court of Appeals state that the trial counsel "* * * was sufficiently satisfied with the responses of these veniremen * * *. And he did not at any time ask for a change of venue", (R. 1247).

The petitioner should not be penalized for his trial counsel's failure to request a change of venue or continuance and the trial court sua sponte should have granted such change in time or place.

If, however, the failure of the petitioner's trial counsel to act becomes essential and controlling, then the petitioner should have been permitted to offer testimony in regard to such lack of effective assistance of counsel.

It is, therefore submitted that the trial of petitioner, which started in an atmosphere of prejudice and hysteria that had reached its climax during the Foster-Zeitz trial, was but a sham and a farce and constituted a denial of due process of law.

III.

The "extraordinary and unprecedented conduct" of Judge Boyer, a judge other than the trial judge in petitioner's trial, who acted as an "overseer judge" and judicial aid to the district attorney and was "known" by the jury as "hostile" to petitioner, deprived petitioner of a possible unprejudiced determination as to the penalty to be imposed—whether death or life—and, therefore, violated the due process clause of the Fourteenth Amendment.

A.

The Recognition by the Majority of the Court of Appeals, that Judge Boyer's Conduct Amounted to a "Rather Striking Manifestation of Extraordinary Interest in the Proceedings" and, also, that the Jury Identified him as "Hostile" to Darcy, Established that Judge Boyer "Had Done Something Prejudicial" to Petitioner, Resulting in a Denial of Due Process.

Under Pennsylvania law, the jury fixes the penalty in first degree murder cases—death or life imprisonment, (18 Purdon's Penna. Statutes Annotated, Section 4701).

Judge Boyer's extraordinary and unusual manifestation of interest and active partisan participation in petitioner's trial had a terrific impact on the jury's fixing Darcy's penalty at death, rather than at life imprisonment.

The majority opinion of the Court of Appeals squarely recognizes the fact that Judge Boyer showed an extraordinary and unusual interest in Darcy's trial. The uncontradicted facts of Judge Boyer's presence and participation were so obvious that they could not be and were not overlooked by the majority.

Obviously, the reason for the indelible impression made upon the majority by Judge Boyer's role in this case was that it was most unusual and extraordinary for another judge to be so actively present—let alone participate—in a trial, in which he did not preside. Nowhere in the records has there been found another example of a "*two-judge*" bench in a criminal or civil trial.

If the fact of Judge Boyer's "extraordinary interest" in Darcy's case made such a lasting impression upon the majority as set forth in the Opinion, then the tremendous impact of his presence and participation must have made an even more effective impression upon the minds of the jurors in the Darcy case.

The effect of the impact of Judge Boyer's role in this case upon the jurors is that his hostile attitude against Darcy was the decisive force in the determination by the jurors of the only issue left to them under Judge Keller's charge—whether to impose imprisonment for life or death as the penalty in this first degree murder case, as provided under Pennsylvania law, (18 Purdon's Penna. Statutes Annotated, Section 4701).

Judge Boyer's conduct in the Darcy trial is most ably analyzed by Kalodner, Circuit Judge, in his dissenting opinion, (R. 1251-1265).

The majority of the Court of Appeals has, at least by inference, recognized that Judge Boyer's conduct during the Darcy trial was a "dubious occurrence" in State procedure which they would proscribe if it should have happened in a Federal Court, (R. 1250).

However, this is not the test as to whether or not there has been a violation of the due process guarantee, as set forth in *Betts vs. Brady*, 316 U. S. 455, (1942), *Johnson v. Zerbst*, 304 U. S. 458, (1938), and *Rochin v. California*, 342 U. S. 165, 172, (1952).

The test as stated in *Chambers v. Florida*, 309 U. S. 227 (1940) is:

> "* * * No man's life, liberty or property, (can) be forfeited as criminal punishment * * * until there has been a charge fairly made and fairly tried in a public tribunal *free* of prejudice, passion, excitement and *tyrannical power*", (pp. 236-237).

Upon consideration of the "totality of facts", evidenced by the majority of the Court of Appeals' admitted factual findings as to Judge Boyer's conduct in the Darcy trial, it is obvious that the petitioner's trial was offensive to the common and fundamental ideas of fairness and righteousness and that his conviction was in violation of the due process clause of the Fourteenth Amendment.

(a)

JUDGE BOYER'S PERSONAL FEELING OF PREJUDICE AGAINST PETITIONER AND COMPANIONS.

Judge Boyer, by his conduct and by his statements in court, evinced a personal antagonism and indignation against the boys from Philadelphia who had made raids into Bucks County. The first expression of his sentiments is found in the Intelligencer issue of March 1, 1948, when both Judges expressed their objection to separate trials, (Rel. Ex. 43; R. 1000a). This statement shows a deliberate attempt to hurry the trial of these homicide cases.

Thereafter, after the Foster-Zeitz jury returned its verdict of guilty of first degree murder, with the death penalty, the Intelligencer issue of June 5, 1948, (Rel. Ex. 78; R. 1071a-1072a), appeared with the following frontpage quotation:

> "JUDGE BOYER PRAISES JURY FOR VERDICT CONDEMNING 2 KILLERS TO THE ELECTRIC CHAIR."

He was reported therein as having told the Jury:

> "I don't see how you could, under the evidence, have reached any other verdict. Your verdict may have a very wholesome effect on other young men in all vicinities who may come to realize the seriousness of the folly in which so many young men indulge these days.
>
> "The only hope of stemming the tide of such crimes by youths is to enforce the law, which you have indicated by your decision", (R. 1071a, R. 1072a).

Apparently the jury's decision to impose the death penalty expressed Judge Boyer's personal sentiments against all the defendants. However, the public expression of such personal feelings by Judge Boyer, reported two days before Darcy's trial, necessarily was circulated and broadcast throughout Bucks County.

During the very period in which Darcy was being tried, Judge Boyer in another case publicly expressed his antagonism against Philadelphians, who came to Bucks County to commit crimes. In the Intelligencer issue of June 12, 1948, (Rel. Ex. 94; R. 1094a-1095a), there appears the following frontpage headline:

> "Judge Boyer Warns that Bucks County is Tired of Thieves from Phila." * * *

Judge Boyer was quoted therein as publicly stating:

> "Asserting that 'We don't propose to nail all our property fast here in Bucks county just because thieves from Philadelphia want to pick up everything which isn't being watched,' Judge Calvin S. Boyer, who sentenced an 18-year-old youth to prison yesterday, asked, 'What business did you have to come up here in the first place?' "
>
> * * *

"'We in Bucks county are tired of you Philadelphians who don't know how to behave. We have to bear the expense and we propose to stop it,' Judge Boyer said." (R. 1094a-1095a).

Bucks County is a small rural county in Pennsylvania. Its two principal newspapers, the Doylestown Daily Intelligencer and Bristol Courier, are jointly owned and controlled and, together with the Philadelphia newspapers, were circulated throughout the county. Judge Boyer's personal views and feelings were thus circulated and broadcast throughout Bucks County. It must be inferred that Bucks Countians were aware of Judge Boyer's personal feelings. After all, his feelings reflected the personal indignation of practically *one out of every three* adults in that county. Therefore, when Judge Boyer even appeared in the courtroom of Judge Keller during the petitioner's trial, it was ipso facto a constant reminder to all Bucks Countians that Judge Boyer had publicly praised the Foster-Zeitz jury and had shown his expressed personal antagonism against Philadelphians, who made criminal forays into Bucks County.

The majority of the Court of Appeals recognized that, under the circumstances existing at the end of the Foster-Zeitz trial:

"The situation certainly would have justified a decision to wait awhile before trying the relator or else to try him in another community if trial immediately after the conviction of his confederates was deemed important * * *", (R. 1248).

Three days later, *on the very first day of the first session of the Court immediately thereafter,* Darcy was placed on trial in the same Bucks County Courthouse in spite of the fact that he had previously been granted a severance.

The factual findings of the majority of the Court of Appeals, in regard to the presence of Judge Boyer in the court room during Darcy's trial, are concisely summarized by Judge Kalodner, in his dissenting opinion, (R. 1251-1265), as follows:

> "It may be well at this point to avert to the factual findings which the majority made on the score of Judge Boyer's presence in the courtroom during Darcy's trial.
>
> "Judge Boyer had presided at the trial of Darcy's two confederates which terminated * * * with a verdict of guilty and the imposition of death sentences by the jury."
>
> * * *
>
> "Honorable Calvin Boyer was much in and about the courtroom during the course of this trial * * *.
>
> "* * * every day of this trial Judge Boyer spent some time, on occasions several hours, in the courtroom. He even attended an evening session.
>
> "At times during the trial Judge Boyer joined Judge Keller on the bench for whispered consultations within view of the jury, although there is nothing to suggest that the jury could hear what was being said.
>
> "* * * at least one such consultation was designed for the guidance of Judge Keller in the making of a trial ruling.
>
> "* * * during Judge Keller's charge to the jury, Judge Boyer sat facing the jurors within the enclosure reserved for members of the bar * * *.
>
> "* * * the jurors knew who Judge Boyer was. The evidence also makes it very probable that they also knew that he had just completed the trial at which relator's (Darcy's) co-defendants had been convicted and sentenced to death. Moreover it had been reported in the press that Judge Boyer had commended the jury for

the first degree verdict against the co-defendants with its mandatory death penalty."

"There was a rather striking manifestation of extraordinary interest in the (trial) proceedings by Judge Boyer."

"It had come to the jury's observation that a judge (Judge Boyer) other than the trial judge was showing much interest in the case", (R. 1253-1254).

The effect of Judge Boyer's presence and conduct in the Darcy trial, viewed in the light of the majority of the Court of Appeals' factual findings, constituted a fundamental unfairness proscribed by the due process guarantee.

Judge Boyer was well known in Bucks County; he had presided over the Foster-Zeitz trial; he had commended the Foster-Zeitz death verdict; he had publicly expressed his antagonism against outsiders (Robert White incident); and three days after the Foster-Zeitz verdict, when Darcy was placed on trial in the same Court, Judge Boyer was in attendance, *beginning with the very first session on the first day*, and participated as much as if he had been the trial judge. The undisputed fact that he was present and showed an "extraordinary interest" in the Darcy trial and that he had a hostile attitude towards "outsiders," necessarily effectively influenced and guided the jurors' imposition of the death sentence.

As stated by Judge Kalodner, Judge Boyer's presence and manifest interest of themselves raised a substantial due process question, principally because the jurors identified him as an official who was hostile to Darcy:

"I believe that if the *jurors identified Judge Boyer as an official who was hostile to Darcy*, such identification in and of itself raised a due process question which must be resolved in favor of Darcy, because a 'hostile' attitude of a judge can, and almost universally

does, effectively influence and guide the jury's verdict", (R. 1254).

* * *

"The United States Supreme Court, the Supreme Court of Pennsylvania and other appellate courts, have time and again emphasized the existence of this significant judge-jury relationship", (R. 1255).

See *Starr vs. United States*, 153 U. S. 614, 626 (1894); *Quercia vs. United States*, 289 U. S. 466, 470 (1933); *Commonwealth vs. Myma*, 278 Pa. 505, 508 (1924); *United States vs. Link* (C. A. 3), 202 F. 2d 592, 595 (1953); *United States vs. Brandt* (C. A. 2), 196 F. 2d 653, 656 (1952).

B.

Judge Boyer's Active Participation in Petitioner's Trial and, Particularly, His (a) Having Made a Ruling Therein, and (b) Having Passed a Note to the District Attorney During the Court's Charge Amounted to a Silent But Eloquent Extra-judicial Aid to the Prosecutor and "To Such Improper Partisan Participation by Judge Boyer in the Trial" as to Constitute a Denial of Due Process.

The record clearly shows that Judge Boyer actively participated in petitioner's trial. The majority opinion of the Court of Appeals recognized that at times he joined Judge Keller on the bench for "*whispered consultations within the view of the jury*" and that "at least one such consultation was designed for the guidance of Judge Keller in the making of a trial ruling." And that he, in effect and in fact, "sat" on the bench with Judge Keller during the course of the trial.

(a)

JUDGE BOYER DID ACTIVELY PARTICIPATE IN DARCY'S TRIAL, WHEN HE ASSISTED IN RULING ON ADMISSION IN EVIDENCE.

During a side bar discussion out of the hearing of the jury, shortly after court convened on Saturday morning, June 12, a difficult question of law arose on the admissibility of evidence of other offenses, (R. 1144a-1146a), in view of the Pennsylvania Act of July 3, 1947, P. L. 1239, (19 Purdon's Penna. Statutes Annotated, Section 711).

This question was a very vital one, for, if the ruling were favorable to the Commonwealth, the jury would have for its consideration Darcy's written admissions of other hold-ups in which he had participated. With such confession before it, the Darcy jury would be more easily persuaded to dispense with any leniency toward the petitioner. As a matter of timing, the ruling on this evidence was also important, because the Commonwealth closed its case shortly thereafter.

Judge Boyer's participation in the ruling, although out of the hearing of the jury, could not help but be noticed by the jurors. The District Court's finding that Judge Boyer left the bench shortly thereafter and did not return during the remainder of the trial is meaningless because the introduction of evidence ended shortly thereafter.

(b)

NOTE PASSING INCIDENT ESTABLISHES IMPROPER PARTICIPATION BY JUDGE BOYER IN THE DARCY TRIAL.

Miss Marian Ford, Joseph Darcy and Miss Margaret Gordon, witnesses called by the petitioner, had testified in

substance that at the conclusion of his charge in the petitioner's case, Judge Keller had inquired of counsel whether he had omitted anything or if there were any corrections. They testified that Mr. Achey, defendant's counsel, indicated he had no objections or corrections and that Judge Keller thereupon proceeded to conclude his charge to the jury. Each of these witnesses testified that Mr. Biester, who was then seated next to Judge Boyer opposite the jury box, received a note from Judge Boyer, read it, stepped to the front of the bench and interposed objections to the Court's Charge, (R. 481a-483a; R. 484a; R. 542a-544a; R. 631a-615a).

Excerpts from the Transcript of Trial of *Commonwealth v. Darcy*, with reference to Judge Keller's charge and the objection of District Attorney Biester, appear in the Record at R. 1146a-1150a.

The *time element* intervening between Judge Keller's request for corrections and suggestions and Mr. Biester's objection, (R. 1148a-1149a), corroborates the testimony of petitioner's three witnesses as to the passing of the note from Judge Boyer to Mr. Biester.

Mr. Biester claimed that he decided to make the objection "immediately after Judge Keller made his statement which I was not in accord with", (R. 914a). The statement made by Judge Keller immediately before the objection was made had nothing to do with the subject matter of the objection. The subject matter of the objection, (R. 1148a),—relative to the issue of flight—had been mentioned by Judge Keller long before the conclusion of his charge.

Mr. Biester's objection was:

> "MR. BIESTER: Your Honor, I may have misunderstood part of your charge, but I thought that you said that if the shooting of Kelly was unintentional, that would be murder of the second degree; that if it were during the flight from the crime it would be murder in the first degree.

THE COURT: I specifically stated it was completely abandoned in the case of flight or escape. That becomes important only; members of the jury, if you are convinced beyond a reasonable doubt, that this shooting of Kelly did not occur during the perpetration of a robbery", (R. 1149a).

The testimony of the respondents' witnesses in denial of the testimony of Miss Ford, Joseph Darcy, and Miss Gordon, is equivocal and cannot constitute a contradiction thereof.

Mr. Biester testified that he had "*No recollection whatsoever*" that "during the charge a note was written and passed by Judge Boyer" to him, (R. 877a-878a). He did not specifically deny that such note was written and passed by Judge Boyer to him during Judge Keller's charge in petitioner's trial, although the present petition for writ of habeas corpus raising this very issue was filed in the District Court on April 3, 1951, and subsequently the subject of argument before the Court of Appeals. More than two years intervened between the date of the first argument before the Court of Appeals and March 20, 1954 when he so testified that he had "no recollection whatsoever", (R. 878a).

If the incident had not occurred Mr. Biester, who was District Attorney and is now a Judge, certainly was informed enough about the rules of evidence to know that the note passing either occurred or did not occur. Later, he testified: "But I do not recall having received the note, or any relation between my arising and the reception of the note", (R. 878a; R. 911a-914a).

Mr. Curtin, then Assistant District Attorney, testified that he had "Absolutely no recollection of any note being handed to Judge—to District Attorney Biester at any time during the Charge of the Court" at the petitioner's trial,

(R. 733a). He did not specifically deny that such a note was written and passed by Judge Boyer to Mr. Biester during Judge Keller's charge.

The majority of the Court of Appeals recognizes that the note-passing incident would have been considered "*such improper partisan participation by Judge Boyer in the trial*," as to come within reach of the due process clause, had the incident been established by the evidence.

The conclusion of the majority of the Court of Appeals, with reference to this incident, is based upon an anomalous finding: that while "the Government's showing (that it had not occurred) was less than overwhelming. Yet it was not unsubstantial," and since "the District Court made a specific finding that this alleged occurrence did not take place. * * * we think that we are not justified in disturbing that finding", (R. 1250).

As opposed to the direct testimony of three witnesses for Darcy that during Judge Keller's charge Judge Boyer sat in his "*special chair*" in the front of the court room, *directly facing and about twenty-three feet away from the jury*, with Mr. Biester seated nearby, that Judge Boyer passed a note to Mr. Biester who *thereupon* arose and interposed an objection to a point in Judge Keller's charge, we have the "*no recollection*" *testimony* of Mr. Biester, the District Attorney, (R. 876a-878a, R. 884a) and his assistant, Mr. Curtin, (R. 731a-733a, R. 739a).

Where a man's life is at stake, as in the instant case, such "no recollection" testimony as given by Mr. Biester and Mr. Curtin cannot and should not be regarded as a "substantial" basis for a finding of fact such as was made by the District Court in this case. Certainly, trial attorneys with the experience of Mr. Biester and Mr. Curtin should have known whether such an incident had or had not occurred.

It is uncontradicted that the District Attorney and his assistant testified that, during Judge Keller's charge to the

jury, *they had left their customary places at the Commonwealth table*, close to the bench and only four feet from the jury, and sat in chairs at the press table, which were on the opposite side of the court room some fifteen feet distant from the jury and some eight feet from Judge Boyer's "special chair." This admitted circumstance corroborated the testimony of the petitioner's three witnesses as to this incident having occurred.

Further, it must be pointed out that the objection raised to the Court's charge by Mr. Biester was one that an experienced trial attorney would have raised immediately upon Judge Keller's having asked for suggestions or corrections at the close of his charge. The time element, elapsing between Judge Keller's requests for corrections or suggestions and Mr. Biester's interposing his objection, corroborates petitioner's contention that the matter was brought to Mr. Biester's attention by the note-passing to him by Judge Boyer.

Certainly, Judge Boyer's extraordinary and unprecedented conduct has never been duplicated in any other criminal trial in Pennsylvania Courts. It was and is not customary, in normal procedure in a Pennsylvania criminal trial, to have virtually a *"two-judge" bench*. Judge Boyer's presence and conduct had such a lasting and compelling impact and impression upon the jury as to take it out of the category of "state procedure" and to bring it within the protection of the due process guarantee of the Fourteenth Amendment.

Chief Judge Biggs, in his dissenting opinion, characterizes the conduct of Judge Boyer in connection with Darcy's trial, (R. 1266), as follows:

> "Judge Boyer's preoccupation with Darcy's trial was intense. * * *. From his repeated visits to and his behavior in the courtroom, the members of the Darcy jury, with reason, could have inferred that he desired to indicate his belief and his desire that Darcy, like

Foster and Zeitz, should be found guilty, and that the penalty of death should be imposed upon him by the jury: that such was the belief and the desire of the judicial authorities of Bucks County. Though in theory a judge does not control the decisions of juries, judicial attitudes have great influence on jurors. *Fairness cannot condone Judge Boyer's conduct*".

"*The foregoing amounts to a denial of due process*" (R. 1266).

Judge Kalodner, in his dissenting opinion, appraises Judge Boyer's unprecedented interest in Darcy's case, (R. 1264), as follows:

"Judge Boyer's extraordinary and unprecedented conduct was totally foreign in every respect to the normal procedural course of a criminal trial in the Pennsylvania courts. It was not in any sense within the periphery of what may be described as the customary and normal procedure in Pennsylvania criminal trials. Its significance in its compelling impact upon the jury was of such proportion and vitality as to take it out of the category of 'state procedure'."

"It is not incidental to any accepted standard of state procedure for a judge to conduct himself as Judge Boyer did in the Darcy trial. It is not incidental in Pennsylvania for a judge who has just completed a trial of a defendant's confederates and praised the jury which found them guilty and fixed death as their penalty, to participate, as Judge Boyer did, in the trial of a third confederate, presided over by the president judge of his court. It is not incidental for a judge to have a 'special chair' placed for his use on the front row of the courtroom where he is in full view of the jury and it is within his full view and for him to sit there as an extra-curricular judicial overseer."

"And it is not incidental in Pennsylvania criminal

trials for a judge to pass a note to the district attorney."

"In my opinion it can fairly be said of Judge Boyer's conduct that *'This is conduct that shocks the conscience' in violation of the due process guarantee*".

"Its inevitable effect was to distort the trial process to the extent at least that Darcy was deprived of a possible unprejudiced jury determination that justice required only the imposition of a life sentence instead of death", (R. 1264).

IV.

Conclusion of argument.

The inescapable conclusion is that this petitioner was prejudged as guilty as a result of the prejudicial influences outside and inside the courtroom resulting from the trial being so highly publicized and from the "overseer judge's" unprecedented interest and participation in the petitioner's trial. As stated in *Shepherd vs. Florida*, 341 U. S. 50, 51 (1951),

"* * * The trial was but a legal gesture to register a verdict already dictated by the press and the public opinion which it generated * * *."

The prejudicial newspaper articles and editorials, as reflected in the public opinion against the petitioner and his companions, aroused prejudice against petitioner in Bucks County, and that his trial was "vitally affected" with an absence of that fundamental fairness essential to the very concept of justice. The out-of-court campaign to convict petitioner did not abate soon after the commission of the crime. On the contrary, it was kept alive and brought to a

burning climax during the Foster-Zeitz trial. These newspaper accounts aroused such prejudice against him in Bucks County as to prevent necessarily a fair trial. It was uncontradicted that the inflammatory newspaper accounts and editorials appeared almost daily for two weeks preceding petitioner's trial.

When one analyzes the voir dire examination of the jurors in petitioner's trial and finds that almost *one out of every three jurors*, who was *asked* the question, *answered* that he had a fixed opinion, the conclusion is inescapable that the petitioner was wholly prejudged as guilty and doomed to the death penalty before his trial even started.

When petitioner's trial started immediately *on the next court day* after the jury in his companions' case had fixed the penalty of death, in a community inflamed by prejudice and passion against "out'anders", before a "two-judge bench" by a district attorney assisted by the "overseer judge" on that bench, then such trial was, in the words of Mr. Justice Holmes, "*a mask*": *Moore vs. Dempsey*, 261 U. S. 86, 91. The petitioner's conviction, under such circumstances, did not meet any civilized conception of due process of law.

WHEREFORE, it is respectfully submitted that the judgment of the Court of Appeals should be reversed.

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